THE INDIAN LAW REPORTS.

ALLAHABAD SERIES,

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT.

REPORTED BY

Privy Council ... C. BOULNOIS, *Middle Temple.*

High Court, Allahabad ... A. STRACHEY, *Inner Temple.* AND W. K. PORTER, *Gray's Inn (Offg.).*

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THE INDIAN LAW REPORTS,

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FULL BENCH.

1889
January 16.

Before Sir John Edge, Kt, Chief Justice, Mr Justice Straight, Mr. Justice Tyrrell, Mr Justice Brodhurst, and Mr Justice Mahmood.

MASHIAT-UN-NISSA (DECREE-HOLDER) v. RANI (JUDGMENT-DEBTOR) *

Limitation—Execution of decree—Act XV of 1877 (*Limitation Act*), *sch ii, art.* 179, *cl* (2)—"*Appeal*"—"*Final decree or order*"—*Decree against defendants severally—Appeal by some only of the judgment-debtors—Civil Procedure Code, s.* 544.

Where a decree for possession of immoveable property was passed not jointly, but severally, as against all the defendants individually, and specifically stated the proportions of which they were severally in possession, as also the costs separately payable by each of them to the plaintiff; and where two only of the defendants appealed on pleas which did not assail the decree in respect of any right or ground common to the appellants and all or any of the non-appealing defendants, but referred merely to the specific property alleged to be in the appellants' hands:—

Held by the Full Bench (Brodhurst and Mahmood, JJ, dissenting) that a first application for execution of the original decree against those defendants who had not appealed from it, and which was made five years after the date of the decree, was barred by limitation, and clause 2 of art 179, sch. ii of the Limitation Act (XV of 1877), did not apply so as to make time run from the proceedings in the appeal preferred by the other defendants. That clause applies only to those cases in which the parties to the execution proceedings were parties to the appeal, or to the class of cases to which s 544 of the Civil Procedure Code applies. *J P Wise* v. *Rajnarain Chuckerbutty* (1) and *Mullick Ahmed Zumma* v. *Muhammad Syad* (2) approved.

* Second appeal No. 672 of 1887 from a decree of C W. P Watts, Esq, District Judge of Moradabad, dated the 21st January 1887, reversing a decree of the Subordinate Judge of Moradabad, dated the 28th August 1886.

(1) 10 W. R, p 30. (2) I L. R., 6 Calc, 194: 6 C. L. R, 573.

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Held by Brodhurst and Mahmood, JJ., *contra*, that art. 179, clause (2), must be construed as applying without any exceptions to decrees from which an appeal has been lodged by any of the parties to the litigation in the original suit *Nur-ul-Hasan* v. *Muhammad Hasan* (1) followed.

THE facts of this case are sufficiently stated in the judgments of Straight and Mahmood, JJ.

Mr. *Roshan Lal* and Babu *Durga Charan Banerji*, for the appellant.

Munshi *Madho Prasad*, for the respondent.

MAHMOOD, J. (after explaining the circumstances under which the case was referred to the Full Bench, continued :—)

The case itself is to my mind already governed by authority. The facts of it are, that one Musammat Mashiat-un-nissa brought a suit against six persons, Ibrar Husain, Mohan Singh, Udai Singh, Musammat Rani, Syad Muhammad Ali, and Iradat Ali, and obtained a decree for possession of immoveable property on the 12th December 1881. In this litigation some parties were absent in the first Court. Among them were Ibrar Husain and Iradat Ali, so that the decree so far as it related to them was a decree passed *ex parte*.

Matters stood thus when only two of the defendants, namely, Udai Singh and Mohan Singh, who were parties defendants to the cause and had defended it, presented an appeal to the lower appellate Court, not from the whole decree, but from a portion thereof. And having read the decree itself in the original Hindustani in which the matter is dealt with, I have no doubt that the original decree was not a joint decree, but a several decree, and that it was in respect of some of the parties an *ex parte* decree. The Court of first appeal decreed the appeal on the 24th April 1882, and from that decree an appeal was presented to this Court, as a Court of second appeal, and this Court by its judgment of the 17th April 1883, restored the decree of the Court of first instance.

The present proceedings began in consequence of an application made by the decree-holder, Musammat Mashiat-un-nissa, who is appellant before us, on the 15th April 1886, and to those proceed-

(1) I. L. R., 8 All. 573.

ings she impleaded, among others, Musammat Rani who was one of the original parties to the original decree, and sought execution against her. Musammat Rani, on the 17th May 1886, preferred objections on the ground, *inter alia*, that the decree was barred by limitation. Upon consideration of these objections, the Court of first instance disallowed the objections, and allowed execution on the 28th August 1886, but the lower appellate Court by its order of the 21st January 1887, allowed the objections, and held that the execution of the decree was barred by limitation.

It is in consequence of that order that this second appeal has been preferred. It has been preferred upon two grounds stated in the memorandum of appeal. The first is that, because the decree was joint and was executed within three years from the date of the final decree of this Court, the judgment of the Court below is wrong. The other reason is that costs having been jointly awarded against all the judgment-debtors, the decree could not have been executed separately against the present respondents alone, and so the decree was not barred. The argument which was addressed to me as a Judge of this Court sitting in the single Bench, also when sitting with my brother Brodhurst, as also when sitting in this Court as member of a Bench of three Judges, also when sitting here in the same capacity as member of a Bench of five Judges, seems to me to raise three points of law which I must say Mr. *Durga Charan Banerji* has argued with much ability. Those points are :—

First, as to the interpretation of art. 179, sch. ii of the Limitation Act (XV of 1877), especially clause 2 of the third column of the article, whether the words "appeal" and "final decree or order of the appellate Court" are to be limited to any particular class of decrees or are to be understood in the broad sense of the words being read without any qualification by importing either epithets or other matters with respect to the statutory words above mentioned.

The second question is, if these words are to be qualified by any qualification outside the statute in which they occur, whether or not the words to be imported are to be limited to any particular class of epithets.

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The third question is, what was exactly the nature of the decree?

Dealing with the third question first, it is clear to me that the decree cannot fall under the words, "joint" or "joint and several," though it may fall, to the extent of the two persons Ibrar Husain and Iradat Ali, under the category of being a decree *ex parte*. I do not, however, wish to deal with this point at any length, because the views which I hold are independent of the nature of the decree. I must, however, refer by way of explanation to the circumstances which to my mind require consideration as to the meaning of the word "decree."

In the course of the argument yesterday I said from the Bench that to my mind if the word decree is to be qualified, it contemplates possibilities of the following description :—

(1) A decree passed *ex parte*.

(2) A decree passed in default.

(3) A decree in an appeal, in respect of a portion of the subject-matter of the decree.

(4) A decree passed in appeal by only one out of several parties or by all the parties.

(5) A decree in an appeal from a decree passed only as to costs.

(6) A decree or order in a Civil Court not governed by the Civil Procedure Code.

And irrespective of other considerations which may refer to the possibilities of the decree, a decree may be qualified by the words "joint," "several," "joint and several."

I have arrived at the conclusion that the real difficulty which arises in this case is that of interpreting the statute whereby the case is governed. In doing so, I am within the authority, not only of judgments in the Courts in England, but also of judgments in British India that the general rule of interpretation is that a word which is to be understood in the language of the statute is to be understood in the most general manner unless there is enough reason to qualify the meaning of the word. In cases where a statute is

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peculiar and limited in its own scope, the principle of interpretation has been to refer to other portions of the statute, but also in cases where there are statutes more than one the Judges have to consider those statutes which are *in pari materia*, and with their help to remove the ambiguity. The rule again is what has been. I believe called in England the golden rule of interpretation, that the Legislature deals with the difficulties which arose before the statute was passed.

I hold this to be a sound principle of interpretation, and I hold also that in the statute, Act XV of 1877, there is nothing to warrant me, either in the first column of article 179, or in the third column of the same article, clause 2, in limiting the word "appeal" or "decree" by any one of the epithets which I have suggested if a broad meaning is to be placed upon those words. This is what I have already said on a former occasion in *Nur-ul Hasan* v. *Muhammad Hasan* (1). I refer especially to the first portion of my judgment which is reported at page 576. There, in expressing my concurrence with the views which Mr. Justice Oldfield had already expressed, I went on to say :—"I have arrived at exactly the same conclusion as my learned brother, but I wish to say that the ground of distinction which he has drawn between the present case and those referred to is, to my mind, very clear. The present case is not necessarily inconsistent with what was ruled there. In the 2nd clause of article 179, there are no words limiting or qualifying the application of those words to decrees in which only one or more of the parties have appealed; the clause as framed must be looked upon as intended to apply, without any exceptions, to decrees from which an appeal has been lodged, by any of the parties to the original proceedings; and I should say the clause should certainly be applied to cases such as the present, where the whole decree was imperilled by the appeal."

It is clear that the main principle upon which my judgment proceeded was that there was no justification for qualifying the words to which reference has already been made by me more than

(1) I. L. R., 8 All., 573.

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once. I think the ruling deals not only with the first point, but also with the second, as stated by me, and I have said enough on the third point. But because in the course of the argument some difficulty was raised by Mr. *Madho Prasad*, for the respondent, as to whether or not in interpreting article 179, we are to read the Civil Procedure Code as to the words "appeal" and "decree" I only wish to touch upon one or two points. A Full Bench of this Court in *Lal Singh* v. *Kunjan* (1) in interpreting s. 540 of the Civil Procedure Code, has held that the word decree as used in that section does not mean an *ex parte* decree, and that from such a decree no appeal would lie, and another Full Bench of this Court in interpreting the same expression has read that section with s. 584 and has held that a second appeal from an *ex parte* decree is allowable: *Ajudhia Prasad* v. *Balmakund* (2). If we were thus to read in the provisions of the Civil Procedure Code as to whether an appeal does or does not lie from *ex parte* decree, the argument would raise more complications in this case than those expected by the arguments of the learned pleaders for the parties, because it so happens that over that question, I have not been able to agree with the majority of this Court in their ruling in *Lal Singh* v. *Kunjan* (1).

Then again, if we were to read the Civil Procedure Code into the provisions of the Limitation Act, another difficulty would arise, and again on account of the Full Bench ruling of this Court as to the meaning of the words "decree which is capable of execution," that is to say, whether it is the last decree passed in the case or also a decree which, though passed by the first Court, contains the mandatory portion of the decree which is capable of execution: *Shohrat Singh* v. *Bridgman* (3) explained in *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (4).

These questions I have only touched upon to show that I do not find any reasons which would justify me in not interpreting the Limitation Act, XV of 1877, by the ordinary rules of interpretation. I hold that the Act is, so far as this point is concerned with

(1) I. L. R., 4 All., 387.
(2) I. L. R., 8 All., 354.
(3) I. L. R., 4 All, 376.
(4) I. L. R., 11 All., 267.

limitation, *in pari materia* with the Civil Procedure Code, and that the Civil Procedure Code cannot be imported for deciding questions of limitation unless there is special reference in the Act. Such special reference occurs in the body of article 179. It occurs also in the later parts of the same article, but it is clear to my mind that, so far as explanation I of the article is concerned, the explanation, like explanation II of the article, is by its own words limited to clause (4) of the article. There are many reasons why the same rule and the same principle which apply to clause (4) as to the extension of the time within which execution is to be limited are not to be made to apply to clause (2). The main reason is that in explanation I the word "appeal" does not occur, and therefore the word "application" in that clause is not to be taken as applying to "appeal" nor even for extending limitation to any decree on account of its having been subjected to appeal. Then again as to explanation II, there is no difficulty connected with this case.

I only wish now to say that there is a vast distinction between cases in which an application for execution is made, there having been no appeal from the decree, and cases in which there has been an appeal as contemplated by clause (2), article 179. I am particularly anxious to say this, because what I have said in *Nur-ul-Hasan* v. *Muhammad Hasan* (1) in the second paragraph of my judgment has been somewhat misunderstood. I said then, "I think the decree-holders in this case might, as a consequence of the appeal by the rival pre-emptors, claim, by analogy, the same footing with reference to limitation for executing their decree as a decree-holder who has taken a step in aid of execution, which is another ground for extending the time for execution, as provided in the fourth clause of the article."

Now when I used the word "might," I meant in that case to which Mr. Justice Oldfield and I were parties, that we were not anxious to question the authority of the ruling in *Sangram Singh* v. *Bujharat Singh* (2), and we therefore distinguished it from the case before us, but it does not imply that we adopted it.

(1) I. L. R., 8 All., 573. (2) I. L. R., 4 All., 36.

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Besides the rulings to which I have referred, Mr. *Durga Charan Banerji* has relied upon the following authorities:—*Ram Lal* v. *Jagganath* (1), *Kishan Sahai* v. *The Collector of Allahabad* (2), *Narsingh Sewak Singh* v. *Madho Das* (3), *Basant Lal* v. *Najm-un-nissa* (4), *Mullick Ahmed Zumma* v. *Muhammad Syad* (5), *Gunga Moyee Dassee* v. *Shib Shunker Bhuttacharjee* (6), *Chedoo Lal* v. *Nand Coomar Lal* (7). Mr. *Madho Prasad* relies upon the following rulings: —*Ilur Proshaud Roy* v. *Enayet Hussein* (8), *J. P. Wise* v. *Rajnarain Chuckerbutty* (9), *Sreenath Mojoomdar* v. *Brojonath Mojoomdar* (10), *Khema Debea* v. *Kamola Kant Bukshee* (11). Those authorities I have of course read with profound respect, but it would be taking up more time of the Court than necessary if I dealt with each of them separately. It seems to me that those rulings which relate to enactments antecedent to Act XV of 1877, are applicable only to cases to which those Acts applied. At least the Full Bench ruling in *J. P. Wise* v. *Rajnarain Chuckerbutty* (9), as also the ruling in *Sreenath Mojoomdar* v. *Brojonath Mojoomdar* (10), have no reference to the present enactment, although, if the same case arose with reference to this enactment, I should have considered it necessary to say more than what I have already said. The rulings antecedent to the enactment then do not throw much light on the present case. I still adhere to the views expressed by me in the case of *Nurul Hasan* v. *Muhammad Hasan* (12), *viz.*, that art. 179 cl. (2) of the Limitation Act (XV of 1877) must be construed as intended to apply without any exceptions to decrees from which an appeal has been lodged by any of the parties to the litigation in the original proceedings.

For those reasons I would decree the appeal and, setting aside the order of the lower appellate Court, remand the case under s. 562 of the Civil Procedure Code for being dealt with according to law, because the learned Judge of the lower appellate Court

(1) Weekly Notes 1884, p. 138.
(2) I. L. R., 4 All, 137.
(3) I. L. R., 4 All, 274.
(4) I. L. R., 6 All, 14.
(5) I. L. R., 6 Cal, 194.
(6) 3 C. L. R., 430.
(7) 6 W. R. Misc., 60.
(8) 2 Cal. L. R., 471.
(9) 10 W. R., 30; 11, B. L. R., 258.
(10) 13 W. R., 309.
(11) 10 W. R., 10; 10 B. L. R. 259 note.
(12) I. L. R., 8 All, 573.

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has reversed the order of the first Court only upon the ground of limitation. As to costs I would make them abide the final result.

STRAIGHT, J.—This is a second appeal upon the execution side, and it arises under the following circumstances. One Musammat Mashiat-un-nissa brought a suit against seven persons, among whom were two persons, named Mohan Singh and Udai Singh, and a third person called Musammat Rani, who is the judgment-debtor, respondent to this appeal. She brought the suit as the daughter of her father Ghulam Raza who had died on the 8th August 1869, and she claimed that Mujib-un-nissa, her mother, having also died on the 22nd February 1876, as against her brother Ibrar Husain, who also was a defendant to the suit, she was entitled to obtain one-third of the estate of which he had obtained possession, he being only entitled to retain two-thirds. It will therefore be seen that the principal defendant to that case was Ibrar Husain, her brother, and it is clear from the plaint that all the other defendants were included in the suit as being in possession of portions of the estate as transferees either directly or indirectly from Ibrar Husain. Each of these defendants put in a separate statement of defence, except Udai Singh and Mohan Singh, who put in a joint defence in which they said, with respect to the property in their possession, that they were in possession of it under certain special circumstances, while as for the respondent Musammat Rani, she said that in respect of the village of Barai, which was the village claimed as against her in the suit, and of which recovery was sought from her, she had bought it from one Behari, who in his turn had obtained it at an auction sale of the rights of Ghulam Raza prior to his death. The Subordinate Judge who tried the case as the Court of first instance went fully and specifically into the various defences raised by the various defendants, and in the result he decreed the claim of Musammat Mashiat-un-nissa against all the defendants with one reservation, namely, that "excepting the mortgagee rights in the village of Gulba and in the grove, she be put in possession of the other property. Costs to be borne by all the defendants with the exception of Bhuri Singh." To give effect to the judgment of

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the Sub-Judge on the 12th December 1881, a decree was drawn up, which, it has been conceded by my brother Mahmood, was a decree severally as against all the defendants individually and in no sense against them jointly, and which specifically stated the proportions of which they were severally and separately in possession, as also the amount of costs each of them was to pay to the plaintiff. Consequently there was no difficulty in the way of the decree-holder doing what explanation II, art. 179 contemplates, *viz.*, making an application for execution against all or any of the judgment-debtors to the decree. With the exception of Udai Singh and Mohan Singh all the judgment-debtors, including the respondent Musammat Rani, remained content with the decree and made no move to obtain a modification or reversal of it by appealing, and, in my opinion, it became a final decree against them according to law. Udai Singh and Mohan Singh, however, did prefer an appeal to the Court of the Judge. I have carefully studied the terms of their memorandum of appeal and there is not to be found in it one single word assailing the decree in respect of any right or ground common to themselves and all or any of the other defendants. On the contrary the pleas taken simply assailed the decree in respect of the specific property alleged to be in the hands of those defendants-appellants as to which they had set up the bar of limitation and other special grounds of defence. Consequently in the Judge's Court the appeal, and the only appeal preferred, was by Mohar Singh and Udai Singh against Musammat Mashiat-un-nissa, and this was the appeal the Judge proceeded to hear and heard. For the reasons given in his judgment he decided that the plaintiff as against Mohan Singh and Udai Singh, could not maintain her suit in the shape in which she had brougut it, and consequently he allowed the appeal and reversed the judgment of the Subordinate Judge in respect of those two defendants and dismissed her suit as to them. She in due course of law preferred a second appeal to this Court which came before Mr. Justice Oldfield and my brother Tyrrell; and they, having considered the judgment of the Judge, were of opinion that it was necessary that certain issues should be tried by the Court

below, and accordingly remanded them under s. 566. The result of the findings on remand was that Mr. Justice Oldfield and my brother Tyrrell practically restored the decision of the first Court in favour of the plaintiff as to those two defendants. It will thus be seen that from the 12th December 1881, there had been standing as against all the defendants with the exception of Udai Singh and Mohan Singh, an unappealed and executable decree in the hands of Musammat Mashiat-un-nissa, the decree-holder, which, I may remark in passing, it has been conceded there was nothing to prevent her from executing against any of the judgment-debtors with the exception of Udai Singh and Mohan Singh. It is this decree, and not the decree of this Court in appeal to which those two particular defendants alone were parties, that is the subject-matter of the execution proceedings now sought to be taken. Musammat Mashiat-un-nissa has now made an application for execution of that decree of 1881, as against Musammat Rani the respondent here, and to this Musammat Rani raises objections and says, "upon the face of it, the decree is barred by limitation, because the decree is dated the 12th December 1881, and here are you making your first application to enforce it in the year 1886." To this the decree-holder responds. "I am all right, because there has been an appeal, and therefore I am saved by the terms of art. 179, 3 column, para. 2, of the Limitation Act." In my opinion it was the duty of the Court which was asked by the decree-holder to execute the decree to see whether there had been an appeal, not by one or two defendants simply assailing a part of the decree specifically and separately affecting them, but an appeal which, though preferred by only two of the defendants, assailed a decree which disposed of the suit on grounds common to themselves and the rest of the defendants. The decree which was passed on the 12th December 1881, did not proceed on grounds common to the defendants; on the contrary, as I have already pointed out, it was several and specific as to each of them and distinguished the proportion of the property deliverable. In other words there were several separate decrees included in one. In so far as it affected the respondent Musammat Rani there never was any appeal, and it seems to me the learned Judge could not have

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taken any other view than he did, namely, that there had been no appeal. I do think that for the purpose of dealing with such a decree as that of a Civil Court of a Subordinate Judge acting under the Civil Procedure Code we are entitled to look to the Civil Procedure Code for information as to what the words "appeal" and "decree" mean, and I am not aware that there is any rule of interpretation or of law that should prevent us from doing so. The principle upon which I have founded my view of this case has been specifically stated, no doubt before the present Limitation Act came into force, by Sir Richard Couch in *J. P. Wise* v. *Rajnarain Chuckerbutty* (1). The same principle has also been recognised by Mr. Justice Pontifex in *Mullick Ahmed Zumma* v. *Muhammad Syad* (2). It seems to me to be a reasonable principle, and it is difficult to understand why one judgment-debtor whose liability is independent of and apart from that of another judgment-debtor under the same decree, under circumstances such as are disclosed in the present case, should have the period of limitation for execution of the decree as against him almost, if not quite, indefinitely postponed because the other judgment-debtor, in respect of matters alien to him and his liability, prefers an appeal. I entirely agree with what my brother Tyrrell has said, and that the appeal ought to be dismissed with costs.

EDGE, C.J.—The facts of the case have been very clearly stated by my brother Straight in his judgment just delivered, and I may say at once that I agree with the conclusions at which he has arrived. There is no doubt considerable difficulty in determining what cl. (2), art. 179, sch. II of the Limitation Act XV of 1877, really means. On the one hand it is not an unreasonable construction which has been put upon that clause by my brothers Brodhurst and Mahmood, but it appears to me that to put that construction upon it would be to extend the period of limitation as against persons who were in no way concerned with an appeal, and whose rights under a decree could not be affected by an appeal to which they were not parties, or whose liabilities under a decree could neither be limited or extended or varied by an appeal to which they were not

(1) 10 W. R., 30. (2) I. L. R., 6 Cal., 194; 6 C. L. R., 573.

parties unless such appeal came within the scope of s. 544 of the Code of Civil Procedure. I cannot see why, in a case such as the present, when it was perfectly competent to the appellant before us to execute the decree of the first Court against those defendants who had not appealed, we should extend the period of limitation by holding the clause I have referred to to mean an appeal by any party to the suit. I think myself that an indication of what was the intention of the persons who drafted the clause in question may be found by examining explanation I to art. 179. It is quite true, as pointed out by my brother Mahmood in the course of the argument, that explanation I does not directly refer to clause (2); but still in the explanation we find it explained that when a decree is a several decree against different persons, the running of limitation will not be suspended by reason only of an application being made for execution against one of the several judgment-debtors. The case to which my brother Straight referred, the Full Bench case of *J. P. Wise* v. *Rajnarain Chuckerbutty* (1), is, I think, consistent with sound common sense. It is true that the case was decided under Act XIV of 1859, and not under the Limitation Act in question here. I infer from the judgment which was delivered by Pontifex and McDonell, JJ., in *Mullick Ahmed Zumman* v. *Muhammad Syad* (2) that they took the same view of the law which the majority of this Bench now take, notwithstanding the cases which have been cited to the contrary. I think cl. 2, art. 179, applies only to those cases in which the parties to the execution proceedings were parties to the proceedings in appeal, or the class of cases to which s. 544 of the Civil Procedure Code applies. On the facts of the case stated by my brother Straight it was not a case in which s. 544 of the Code of Civil Procedure would apply, as there was nothing common between the case of the defendants who appealed from the original decree and the other defendants. The defendants who appealed were fighting their own battle which did not concern the consideration of the case of the other defendants in the suit. I am of opinion that the appeal here should be dismissed with costs. As the

(1) 10 W. R., 30. (2) I. L. R., 6 Calc., 194.

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majority of the Court are of this opinion, the appeal is dismissed with costs.

BRODHURST, J.—Numerous rulings of this Court and of the Calcutta High Court have been referred to by the learned pleader for the appellant in support of his pleas. The rulings of this Court include judgments delivered even by a majority of this Court as now constituted. In *Nur-ul Hasan* v. *Muhammad Hasan* (1) Mr. Justice Oldfield in the course of his judgment remarked—"Nur-ul Hasan, the purchaser of the property, has now preferred this appeal on the ground that the application for execution is barred, having been filed more than three years after the passing of the decree. In my opinion the appeal fails because art. 179, cl. (2), being the limitation law applicable, the time should run from the date of the decree of the appellate Court. It is contended that that law is inapplicable because the appellant did not appeal from the original decree, and so far as he is concerned the respondents ought to have executed the decree irrespectively of the fact that an appeal had been preferred by some of the defendants. On this point certain decisions have been brought to our notice, *viz.*, *Hur Prashad Roy* v. *Enayet Hussain*, *Sangram Singh* v. *Bujharat Singh*. I think those cases are distinguishable from the present case, as in this case, although only one set of defendants appealed against the original decree, the grounds of such appeal imperilled the rights of the plaintiffs-respondents which they had obtained by a decree against all the defendants. Had the appeal of the second set of pre-emptors succeeded, the property decreed to the respondents would have passed away from them, and there would have been no decree for them to execute against the present appellant. I think this circumstance marks the distinction between the present case and the cases cited; but for my own part I think the terms of art. 179, cl. (2), are so clear and distinct that they scarcely admit of any such distinction being drawn. Under that law the period for the execution of a decree will begin to run, where there has been an appeal, from the date of the final decree or order of the appellate Court. It

(1) I. L. R., 8 All., 573.

contains nothing as to whether the appeal shall have been made by all the parties, or by one, or how far the appellate Court's order may or may not affect the rights of parties who have not appealed. It seems to me to give a plain and clear rule that in all cases where there has been an appeal the date of the final decision of the appellate Court shall be the date from which the time for execution will begin to run. In support of the view I am taking that in the present case limitation should run from the date of the appellate Court's decree, I may refer to *Mullick Ahmed Zumma* v. *Muhammad Syad* and *Ram Lal* v. *Jagannath*." And my brother Mahmood observed: "I have arived at exactly the same conclusion as my learned brother, but I wish to say that the ground of distinction which he has drawn between the present case and those referred to is to my mind very clear. The present case is not necessarily inconsistent with what was ruled there. In the second clause of art. 179 there are no words limiting or qualifying the application of those words to decrees in which only one or more of the parties have appealed; the clause as framed must be looked upon as intended to apply without any exceptions to decrees from which an appeal has been lodged by any of the parties to the original proceedings."

These rulings have not been refuted by the judgment of any Bench of a High Court that has been reported or that I have had an opportunity of considering. I concur in these rulings, and I would therefore allow the appeal and remand the case to the lower appellate Court, under s. 562 of the Civil Procedure Code, for disposal of the other points raised before it. Costs should abide the result.

TYRRELL, J.—In my opinion the limitation applicable is that of art. 179, cl. (i), sch. ii, of the Limitation Act (XV of 1877) and time against the decree-holder began to run from the date of the decree of the Subordinate Judge of Moradabad, which is the only decree passed in the cause between the decree-holder and the respondent, a decree which had become final long before the institution of the

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present proceedings in execution. As there was no appeal in the case between the parties to those proceedings, I am of opinion that the limitation of art. 179, clause (2), is inapplicable to this case. Several cases were cited on behalf of the appellant in which art. 179, cl. (2), was applied against judgment-debtors, who had not been parties to an appeal that had been made between other parties to the case; but most, if not all of these, were cases which either fell within the scope of s. 544 of the Civil Procedure Code now in force or would be amenable to the principle explained by Mr. Justice Oldfield in *Nur-ul Hasan* v. *Muhammad Hasan* (1), that is to say, they were cases in which the whole decree was appealed against, and the appellate Court dealt with the decree as a whole upon questions affecting all the parties to the decree, or cases in which the integrity of the decree as affecting the parties in the cause was imperilled. But the case before us, as well as the case of *Sangram Singh* v. *Bujharat Singh* (2) seems to me to be of an essentially different character. In both these cases the decree though one in form was in effect a decree awarding several reliefs having nothing in common as touching the individuals thereby severally affected. I think the distinction I have endeavoured to draw between the two classes of cases above referred to is justified, by way of analogy at least, by the rules contained in the explanation appended to cl. 4 of art. 179 and by the principles laid down in many cases, among which I may mention *Sreenath Mojoomdar* v. *Brojonath Mojoomdar* (3) and *Mullick Ahmed Zumma* v. *Muhammad Syad* (4). Accordingly I am of opinion that the rule followed by my brother Straight and myself in *Sangram Singh* v. *Bujharat Singh* (2) is applicable to the conditions of the present case, and therefore that the appeal of the decree-holder ought to be dismissed with costs.

Appeal dismissed.

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(1) I. L. R., 8 All., 573.
(2) I. L. R., 4 All., 36.
(3) 13 W. R., 309.
(4) I. L. R., 6 Cal., 194; 6 C. L. R., 573.

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Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Brodhurst, and Mr. Justice Mahmood.

MAHESH RAI AND OTHERS (DEFENDANTS) *v.* CHANDAR RAI AND OTHERS (PLAINTIFFS.)*

Jurisdiction—Civil and Revenue Courts—Suit for declaration that tenants are shikmis and not occupancy tenants, and that their holdings are plaintiffs' sir land—Act XII of 1881 (*N.-W. P. Rent Act*), *ss.* 10, 95 (*a*)—*Act XIX of* 1873 (*N.-W. P. Land Revenue Act*), *s.* 241—*Act I of* 1877 (*Specific Relief Act*), *s.* 42.

The effect of s. 95(*a*) and s. 10 of the North-Western Provinces Rent Act (XII of 1881) is to deprive the Civil Courts of jurisdiction to take cognizance of any suit the object of which is to declare, as between the zamíndár and tenants, the status of the tenants.

A Civil Court has no jurisdiction to entertain a suit in which, the defendants being admittedly the tenants of the plaintiffs, the plaintiffs pray for a declaration that certain entries of the defendants in the revenue records as occupancy tenants, and certain orders of the Revenue Courts maintaining those entries, be set aside, and that the defendants are shikmis and not occupancy tenants, and that the land in question is the plaintiffs' sír land. Such a suit cannot be brought within the Civil Court's jurisdiction by dropping all the reliefs claimed except the last mentioned declaration, that being merely of importance as incidental to the previous ones, and as a roundabout mode of obtaining a declaration that the defendants are not the plaintiffs' occupancy tenants.

Per Edge, C.J., and Mahmood, J.—Whether the last-mentioned prayer is one which could be brought under s. 42 of the Specific Relief Act, *quære.*

Per Straight, J.—The suit might also be considered as one to set aside orders passed by the Settlement Officer in the discharge of his duty for the purpose of correcting the jamabandi as a part of the record of rights, and thus the jurisdiction of the Civil Court was barred by s. 241 of the North-Western Provinces Land Revenue Act (XIX of 1873).

THIS suit was instituted under the following circumstances. The plaintiffs were zamíndárs and the defendants were tenants of certain villages in taluqa Unjiar in the district of Gházipur. The holding occupied by the defendants was 17 bíghas in extent, and at the settlement of 1840 was recorded as the sír land of one Chattar Rai, the ancestor and predecessor in title of the plaintiffs Chandar Rai and Siparas Rai. The names of Chandar Rai and Siparas Rai, and of their co-sharers Hira, Jaimangal, Bhairo, Rambandan, and

* Second Appeal No. 839 of 1887 from a decree of G. J. Nicholls, Esq., District Judge of Gházipur, dated the 15th April 1887, reversing a decree of Pandit Kashi Narain, Subordinate Judge of Gházipur, dated the 29th April 1886.

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Ram Prasad were recorded in the jamabandi, from 1857 to 1862, in respect of the 17 bíghas, which were always shown as sír land. In 1862 a change was made, the defendants being then recorded in the jamabandi as occupancy tenants in respect of the 17 bíghas, and from that time the land was no longer described as sír. It was entered as "share of Chandar Rai, Siparas Rai, Kali Charan Rai, Kauleshar Rai, kashtkars." In or about the year 1288 fasli (1881 A.D.) at or shortly before the revision of the settlement of the district, the plaintiffs became aware of the nature of the entry in the jamabandi, and they filed an objection in the Settlement Department to the effect that the land was their sír land, and that the defendants were in possession as their shikmi sub-tenants, and not as occupancy tenants, and that the entry of the defendants' names as occupancy tenants had been brought about fraudulently and by collusion with the patwári. The objection came before the Assistant Settlement Officer, whose order thus described the issue between the parties: "The plaintiffs' claim is that the sír belongs to them, and that the defendants are shikmi sub-tenants, and that the plaintiffs receive rent at the rate of Rs. 5. The defendants plead that 17 bíghas in six mauzas are held by them as principal tenants at a rent of Rs. 17-13-0, at the rate of Re. 1 per bígha; that the groves Nos. 295, 111, and 112 are within their cultivatory holding, and that Nos. 295, &c., have been planted by their ancestors."

The Assistant Settlement Officer decided this issue in favour of the plaintiffs, and he held that the 17 bíghas were their sír land, of which the defendants were in possession as shikmis only, and he directed that the jamabandi should be amended accordingly. The defendants appealed from this decision to the Settlement Officer, who, by an order dated the 13th August 1884, reversed the Assistant Settlements Officer's order, and held that the defendants were occupancy tenants of the 17 bíghas, which were not sír land. On further appeal, this decision was affirmed on the 6th November 1884 by the Commissioner of Benares, and on the 27th March 1885 by the Board of Revenue.

On the 24th November 1885, the plaintiffs instituted the present suit in the Court of the Subordinate Judge of Gházipur. The plaint, after reciting the orders passed by the Revenue Courts, continued :—

"As this finding of the Revenue Department clearly affects our rights injuriously, and as there is no other means of getting relief except by instituting a suit in Court, therefore the plaintiffs pray judgment as follows :—

"That a declaratory decree be passed in plaintiffs' favour and against the defendants in respect of 17 bighas 1 biswa 13 dhurs of sír land as per numbers given below, situated in taluqa Unjiar, pargana Garh, valued at Rs. 2,135-0-0, and it be declared that the land claimed is the plaintiffs' sír; that the defendants' allegation and adverse possession set up by them in respect of the said land be held as null and void, and that the whole of the Court costs be allowed.

"That the judgment of the Revenue Court, so far as it is injurious to the plaintiffs' rights, be declared as set aside and of no effect.

"That it should also be decided that the defendants' possession is as sub-tenants *(asami shikmis)* under a settlement for a short period, which in no way affects our sír land.

"The cause of action arose on the 13th August 1884, when the defendants were held to be occupancy tenants."

The Court of first instance (Subordinate Judge of Gházipur) dismissed the suit. The lower appellate Court (District Judge of Gházipur) set aside the first Court's decree and allowed the claim.

The defendants appealed to the High Court. Their first ground of appeal (repeating the contentions which they had raised in both the lower Courts) was :—

"That the tenancy of the appellants in respect of the land in suit belonging to the plaintiffs-respondents being admitted, it was for the Revenue Courts to determine the nature of such tenure, and the suit is not cognizable by the Civil Courts."

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Mr. *C. H. Hill* and Pandit *Sundar Lal*, for the appellants.

The Hon. *T. Conlan*, Mr. *G. T. Spankie*, and Mr. *Amir-ud-din*, for the respondents.

The case came for hearing before Edge, C. J., and Brodhurst, J., who passed the following order:—

"We refer this case to the Full Bench of five Judges, so far only as the question of the jurisdiction of the Civil Court is concerned."

At the hearing before the Full Bench, Mr. *G. T. Spankie*, on behalf of the appellants, withdrew the second and third prayers contained in the plaint; and the case was argued solely on the question whether the suit was maintainable in a Civil Court as a suit for a declaration that the land in dispute was the plaintiffs' sír land.

EDGE, C.J.—In this case the plaintiffs are zamíndárs of a mahal, and the defendants were admittedly tenants of the plaintiffs. I say admittedly, because there is no question here of suing a trespasser. The plaintiffs said that the defendants were their tenants, and the defendants admitted that they were tenants of the plaintiffs. The only question between the parties was whether the defendants were, as the plaintiffs said they were, the *shikmi* tenants of the plaintiffs or the occupancy tenants of the plaintiffs as the defendants alleged that they were. The question arose on the revenue side. On that side it was decided in three different appeals, ending with the Board of Revenue, that the defendants were occupancy tenants of the plaintiffs. It is not material whether that point was ever decided on the Revenue side or not: the question is, can this suit be maintained in a Civil Court? This suit which the plaintiffs have brought, is in fact one the object of which is to get a declaration that the defendants are not the occupancy tenants of the plaintiffs, but merely their *shikmi* tenants, and, as leading up to that end, it is asked as part of their prayer that it should be declared that the land which is cultivated by the defendants is the *sir* of the plaintiffs. I say that that is purely an

incidental part of the prayer in this suit, because the suit really turned on the question of the *status* of the defendants as tenants; the question of *sír* land or not is merely a matter incidental. The lower appellate Court on appeal went at great length into the evidence relating to the land in question from the date of the settlement of 1840, and came to the conclusion that the defendants were not occupancy tenants, but *shikmi* tenants. In fact the only point which the lower appellate Court did try was the real point in dispute between the parties in the case, and that was, what was the *status* of the defendants. The case came in second appeal before my brother Brodhurst and myself. It was contended before us, as has been contended here to-day, that the suit is not one which is cognizable by the Civil Court, and that it is a suit, if maintainable at all, for the Revenue Court, and is not maintainable in the Civil Court.

It is quite clear to my mind that the effect of s. 95, cl.(*a*), and s. 10 of the Rent Act (XII of 1881) is to deprive the Civil Court of jurisdiction to take cognizance of any suit the object of which is to declare, as between the zamíndárs and tenants, the *status* of the tenants. Under s. 10 of the Rent Act, the Collector is the person who has to decide whether a tenant is a tenant at fixed rate or an ex-proprietary tenant or an occupancy tenant, or whether he is some other kind of tenant who has got no right of occupancy, and under s. 95 of the Rent Act, that question is tied up to the Revenue side, and a Civil Court has got no jurisdiction in the matter. Mr. *Spankie* when the case came on to-day informed us on behalf of his clients, the plaintiffs in the suit, that he abandoned that part of the prayer in the plaint which asked for a declaration that the entry in the Revenue record be set aside, and that part of the prayer which asked for a declaration that the defendants were *shikmis* and not occupancy tenants. What remains then after such an abandonment? There remains of the prayer really the incidental and tail end; an incidental portion which could only be of importance where the plaintiffs were trying to obtain one or other of the declarations, the prayer for which Mr.

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Spankie has abandoned. I do not think that in a case between a landlord and a tenant the landlord can come into the Civil Court and can ask for a declaration that the land is his *sir*, if the defendant is in occupation of it; because the only object of having such declaration would be to get the Court in a roundabout way to say that the defendant was not the occupancy tenant of the landlord. Further, I very much doubt whether such an emasculated prayer as Mr. *Spankie* has put before us here is one which could be brought under s. 42 of the Specific Relief Act. The legal character of the plaintiffs as landlords is not denied; what are then their rights which they want a declaration in respect of? The only declaration would be a right to have it declared that it is their *sír* land freed from the right of the defendants as occupancy tenants. That is to decide that the defendants are not occupancy tenants, and that is a question of tenancy, which is not one for a Civil Court, but for a Revenue Court to decide.

Whether we look at this suit as it first came to this Court and as it was referred to the Full Bench, or whether we look upon the suit as emasculated by the abandonment of the other prayers by Mr. *Spankie*, the suit in either case is not maintainable in a Civil Court. I do not wish it to be inferred that I have any doubt that a Civil Court has jurisdiction, as between a zamindár and a trespasser, to decide whether land is *sír* or not. But this is quite a different case. This is a case between persons who are admittedly landlord and tenant. The real object of the suit is to get a Civil Court to interfere with the jurisdiction of the Revenue Courts. This case should be referred back to my brother Brodhurst and myself for decision with an expression of opinion that the suit, as originally brought, or in its emasculated form, is not one within the jurisdiction of the Civil Courts.

STRAIGHT, J.—As I think it very desirable in this case with regard to the question of the jurisdiction of the Civil and Revenue Courts that the reasons for our decision should appear very clearly, I wish to state what I understand the facts are out of which the suit now before us has originated. It seems that in respect of the

land to which it relates the defendants, so far back as the year 1862, were recorded in the *jamabandi* as occupancy tenants, and that somewhere about 1288 fasli the plaintiffs first ascertained that this entry stood in this way in the *jamabandi*. At or soon after that time the revision of the settlement of this district was proceeding, and objection was taken by the present plaintiffs to this entry in the *jamabandi*. That objection was heard in the first instance by the Deputy Settlement Collector, and he came to the conclusion that the land was, as claimed by the plaintiffs, their *sír* land, and that the defendants were in occupation of it as *shikmis*, and he proceeded to direct that the entries should be amended accordingly. From that decision of his there was an appeal, as by law provided, to the Settlement Officer Mr. Irvine, and he, after going fully into the matter, upon the 13th August 1884, reversed the Deputy Settlement Officer's decision, and held that the defendants were occupancy tenants and that the land to which the plaintiffs' application related was not *sír* land. From his decision there was an appeal to the Commissioner, and the Commissioner upheld that view. From the Commissioner's decision there was an appeal to the Board of Revenue and the Board took the same view, and accordingly in the *jamabandi* stand the names of the defendants as occupancy tenants at a particular rate of rent. Having failed in all their proceedings in the Revenue Courts, the plaintiffs then came into Court with the present suit, and by their plaint what they sought was to have it declared that the land claimed is the plaintiffs' *sír*; that the defendants' allegation of adverse possession set up by them was null and void; that the judgment of the Revenue Court so far as it is injurious to the plaintiffs' right be set aside and of no effect, and that it should be decided that the defendants' possession "is that of sub-tenants, which in no way injuriously affects their *sír* land."

To-day at the commencement of the argument of this reference, which is concerned solely with the question of jurisdiction, Mr. *Spankie* very ingeniously withdrew that portion of his plaint which in terms asked for a declaration that the defendants were the *shikmi* tenants of the plaintiffs. For my own part it does not seem to me

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that that withdrawal alters the real nature and character of this suit, which, as any one who reads the plaint carefully for a moment must feel, is nothing more than a suit brought for the purpose of getting out of the adverse orders passed by the Revenue Courts, and obtaining a declaration to the effect that the land is of such a character that the defendants could not, and cannot, be the occupancy tenants of that land. I quite agree with what has been said that in order to oust the jurisdiction of the Civil Courts there must be a clear declaration in the statute that the jurisdiction of that Court is excluded. Whether I look upon this suit as a suit in the nature of that to which s. 95(*a*) would apply, *viz.*, that it really involves questions a consideration of which could be made the subject of an application to determine the nature or class of the tenants' tenure, or whether I regard it as of a different character and as assailing something done by the Settlement Officer, it appears to me that it falls within a category of cases as to which the jurisdiction of the Civil Court is specifically and directly prohibited by law. Of course in all these cases language can be found to put a plaint into such a shape as to make it appear as if the suit was of a civil nature. But whether as dealing with an application such as that which is mentioned in cl. (*a*), s. 95, or making such an order as a Settlement Officer can make under s. 53 and the following sections, it must necessarily be a part of that officer's duty to ascertain, among other things, what was the nature of the land in respect of which he had to declare the character of the tenant's tenure. As I put the illustration to Mr. *Spankie* during the course of the argument, so I repeat it now. Suppose a zamíndár comes into Court and seeks to eject a tenant upon the ground that he is an occupancy tenant paying a specified rate of rent. The defendant says :—"I am not an occupancy tenant, but I am ex-proprietary tenant." Now, for the purposes of determining whether the ejectment should be granted, it would be the duty of the Revenue Officer to determine what was the precise nature of the tenure. According as it was found whether the tenant was an occupancy tenant or an ex-proprietary tenant, so would the question of his being an occupancy or an ex-proprietary tenant be set at rest. I asked Mr. *Spankie* whether a

tenant against whom a Revenue Court had declared that he was not an ex-proprietary tenant could go into the Civil Court to have it declared that he was an ex-proprietary tenant and that the land was once his *sír* land. Mr. *Spankie* says "Yes." I do not think he can. It seems to me that would be inviting a Civil Court to take cognizance over a matter which is exclusively within the jurisdiction of the Rent Court. In this particular case the orders of the Settlement Officer were made in the discharge of his duty as a Settlement Officer for the purpose of correcting the jamabandi which is a portion of the record of rights, and in the course of that duty it was his business to determine the class of the tenants' tenure and the rate of rent payable by them. Looking at the case from this point of view, it is in my opinion prohibited by s. 241, Land Revenue Act, and the jurisdiction of the Civil Court is excluded in respect of such a suit as the present. I concur in the order proposed by the learned Chief Justice.

BRODHURST, J.—I concur with the learned Chief Justice and my brother Straight.

TYRRELL, J.—I also concur with the learned Chief Justice and my brother Straight.

MAHMOOD, J.—I also concur in the order made by the learned Chief Justice in this case. I understand that the solitary question which has been referred to the Full Bench in this case is whether or not, upon the pleadings of the parties in this litigation and the frame of the suit, and especially with reference to the prayers contained in the plaint, this was or was not a suit cognizable by the Civil Court. To this solitary question, which, as I said, is the one which we have to consider, I give an answer in the negative. The relation of landlord and tenant is admitted to exist between the parties to the suit, and the defendants-appellants have obtained an adjudication from the Revenue Courts that they are occupancy tenants. It is clear after having read the plaint in the suit that the object of the suit was only of a declaratory character, especially what the learned Chief Justice terms the emasculated plaint, which is now before the Full Court after the withdrawal of the other

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reliefs by Mr. *Spankie*. The plaint so altered, and indeed without such alteration, amounted to what? It amounted to praying for setting aside orders made by the Revenue Courts in the admitted exercise of their jurisdiction as to the determination of the class of tenants to which this suit in the Civil Court relates, which determination is also, as I have already said, the object of the present litigation.

Dealing with the plaint in this manner, I have no doubt that it was a plaint such as a Civil Court might have entertained, if it could have entertained it subject to the limitations contained in s. 11 of the Civil Procedure Code itself. One of those restrictions involved in that very section is the turning point of the answer which we should give to the reference, *viz.*, s. 95 of Act XII of 1881 of which I consider it important to consider the first paragraph, because it is so worded as to include "any dispute or matter on which any application of the nature mentioned in this section might be made." And among them is cl. (*a*) of that same section which says "application to determine the nature and class of a tenant's tenure under s. 10." Now s. 10 of the Rent Act undoubtedly contemplates applications made by a tenant, and if the first part of s. 95 did indeed limit it to applications only by tenants for the purpose of determining the nature of their tenure, then I should have some difficulty in holding that the general provisions of s. 11 of the Civil Procedure Code were limited. But s. 95 of the Rent Act places the matter upon a broader footing, a footing which the learned Chief Justice has described, which might involve not only applications such as s. 10 contemplates, but also all disputes or matters such as might be required to be considered by reason of the jurisdiction which is thus exclusively given to the Revenue Court, or rather I should call it the Rent Court.

This being so, I have no doubt, and I agree with the learned Chief Justice in holding that it is a matter of no consequence what the Revenue Courts have actually done in connection with the exercise of jurisdiction as to the determination of the nature of the

tenure which the defendants-appellants before us have in respect of the land which forms the subject of the suit.

But what is important for me to state is that I also concur with the learned Chief Justice in that part of his judgment in which he referred to the provisions of s. 42 of the Specific Relief Act (I of 1877) as limiting, restricting or formulating the jurisdiction of the Civil Courts for the purpose of passing declaratory decrees in which no consequential relief was prayed for. It is clear that the object of the suit was of a wholly declaratory character. It did not pray for any consequential relief, even in the shape of the ouster of the defendants, and obviously because no such ouster could be claimed after the declaration by the Revenue Court as to the defendants-appellants being the occupancy tenants of the land. There could be no such claim of ouster upon the ground that the defendants were trespassers, because the case admittedly is one between landlord and tenant. That being so, it seems to me that, irrespective of anything in the Rent Act, s. 95, cl. (*a*), and s. 10 of the same enactment, the case in its present simple form could not be maintained.

Now this is the way in which I have dealt with the reference, and I wish to make no further observations beyond pointing out that the interpretation which I have placed upon cl. (*a*), s. 95 of the Rent Act, and s. 10 of that enactment, as implying that all disputes between parties to a litigation in which the relation of landlord and tenant is not only not denied but actually admitted, as in this case, must be dealt with by the Revenue Court under that enactment, is borne out by the preamble of that statute to the exact terms of which I wish to call attention. I am satisfied therefore that this was a suit not cognizable by a Civil Court, and I agree in the order which the learned Chief Justice has made.

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APPELLATE CIVIL.

Before Mr. Justice Mahmood and Mr. Justice Young.

KISHAN LAL (PLAINTIFF) *v.* GANGA RAM AND ANOTHER (DEFENDANTS).*

Mortgage—Hypothecation—Charge—Lien—Transfer of interest in immoveable property—Construction of document—Words—"Arh"—"Mustaghraq"—Power of sale in default—Bonâ fide *purchaser for value without notice—Rights of purchaser at sale in execution of money decree—Act IV of* 1882 (*Transfer of Property Act*), *ss.* 40, 58 (*b*), 69, 100.

In January 1883 a decree was obtained upon a bond executed in October 1875, whereby certain immoveable property was made security for a loan, the transaction being described not by the word "*rehan*" or mortgage, but by the words "*arh*" and "*mustaghraq*." The instrument contained no express covenant for sale of the property in default of payment, but it contained a covenant prohibiting alienation until payment, and a stipulation that, in the event of the property specified being destroyed or proving insufficient to satisfy the debt, the obligee might realize the amount from the obligor's person and other property. The decree directed the sale of the property as in the terms of an ordinary decree for the sale of mortgaged property. In 1885, before any steps had been taken in execution of the decree, the same property was sold in execution of a simple money decree against the obligor, and the purchaser obtained possession. It was found as a fact that at the time of the sale the bond of October 1875, and the decree thereon of January 1883, were not notified, but through no fault of the obligee decree-holder, and that the purchaser was a *bonâ fide* transferee for value without notice of the bond and decree.

Held that the words "*arh*" and "*mustaghraq*" used in the bond implied a power of sale in default and denoted a mortgage without possession: that the transaction, though entered into prior to the passing of the Transfer of Property Act (IV of 1882), must be regarded as amounting to a simple mortgage as defined in s. 58 (*b*) of that Act, and not as merely creating a charge as defined in s. 100; and that consequently the rights of the obligee must prevail over those of the subsequent *bonâ fide* purchaser for value without notice of the bond and the decree thereon.

Held also by Mahmood, J., that the title of the judgment-debtor at the time of the sale in 1885 in execution of the simple money decree was subject to the mortgage decree of January 1883, and the purchaser at that sale could acquire no higher title than the judgment-debtor possessed, and was equally bound by the terms of the decree of January 1883, in respect of the property which he had purchased, and could not prevent the property being sold under that decree except by paying up the decretal

* Second Appeal No. 868 of 1888 from a decree of H. F. Evans, Esq., District Judge of Aligarh, dated 13th February 1888, confirming a decree of Babu Abinash Chander Banerji, Subordinate Judge of Aligarh, dated the 6th May 1887.

money. *Unnopoorna Dasee* v. *Nufur Poddar* (1) and *Raja'h Enayet Hossein* v. *Gridhari Lal* (2) referred to.

Per Mahmood, J.—The power of sale mentioned in s. 58 (*b*) of the Transfer of Property Act is not a power in the mortgagee to bring the mortgaged property to sale independently of a Court. The observations on this point of Muttusami Ayyar, J., in *Rangasami* v. *Muttu Kumarappa* (3), of Birdwood and Jardine, JJ., in *Khemji Bhagvandas* v. *Rama* (4) and of Petheram, C.J., in *Shedratan Kuar* v. *Mahipal Kuar* (5), dissented from.

The nature of simple mortgage, hypothecation, charge and lien discussed.

Aliba v. *Nanu* (6), *Martin* v. *Purseram* (7), *Raj Coomer Ram Gopal Narain Singh* v. *Ram Dutt Chowdhry* (8), *Moti Ram* v. *Vitai* (9), *Gopal Pandey* v. *Parsotam Das* (10), *Shib Lal* v. *Ganga Prasad* (11), *Girdhar Ranchoddas* v. *Hakamchand Revachand* (12), *Sobhagchand Gulabchand* v. *Bhaichand* (13), *Naran Purshotam* v. *Dolatram Virchand* (14), and *Durga Prasad* v. *Shambhu Nath* (15), referred to.

THE facts of this case were as follows. On the 18th October 1875, one Baldeo Das *alias* Bal Kishan executed in favour of Nathu Ram a deed in the following terms:—

"I Balkishan, son of Megraj, caste Bakkal Bara Sevi, resident of múhalla Bahi Kila, one of the quarters of the town of Kol, do declare that I have borrowed in cash Rs. 500, half of which is Rs. 250, from Nathu Ram, son of Bindaban, caste Bakkal Bara Sevi, resident of mauza Marwar, pargana Hasangarh, in the district of Aligarh, and have brought the same to my use. I promise in writing that the same shall be paid on demand to Nathu Ram aforesaid with interest at the rate of annas 14 per cent. without any objection or excuse. If I fail to pay interest for six months, interest will be paid also on the interest overdue at the rate of annas 14 per cent. Until repayment of the aforesaid sum I shall not transfer to any one else in any way a pucka built shop belonging to me situated in Bazaar Kalan in the town of Kol and bounded on the east by the shop of Rup Ram Bakkal, on the west by the

(1) 21 W. R., 148.
(2) 12 Moo I A., 366.
(3) I. L. R., 10 Mad. 509
(4) I. L. R., 10 Bom., 519.
(5) I. L. R., 7 All., 258.
(6) I. L. R., 9 Mad., 218.
(7) 2 Agra, 124.
(8) 13 W. R., (F B.), 82.
(9) I. L. R., 13 Bom., 90.
(10) I. L. R., 5 All., 121.
(11) I. L. R., 6 All., 551.
(12) 8 Bom., H. C Rep., 75.
(13) I. L. R., 6 Bom., 198.
(14) I. L. R., 6 Bom., 538.
(15) I. L. R., 8 All., 86.

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shop of Hukam Chand and Roshan Lal, on the south by the door of the shop and the road, and on the north by the house of Nur Muhammad Shaikh, which I have hypothecated (*arh mustaghraq*) in this bond. Should I do so, the act would be invalid. If by mischance the property hypothecated (*shai mustaghaqa*) should by some unforeseen accident be destroyed or should prove insufficient to satisfy the bond debt, the obligee aforesaid shall be at liberty to realize the amount of this bond from my other property and person. I shall have no objection to this. I have written these presents in the shape of a hypothecation bond that they may serve as evidence and be of use when needed."

This bond was duly registered.

On the 9th September 1879, Baldeo Das mortgaged the same shop to Dal Chand. On the 27th January 1883, Nathu Ram, in a suit brought by him against Baldeo Das and Dal Chand, obtained a decree upon his bond of the 18th October 1875. This decree directed the sale of the shop, in the terms of a decree for enforcement of a simple mortgage. Before any steps were taken in execution of this decree, the same shop was on the 4th March 1885, sold in execution of a simple money decree held by one Hazari Mal against Baldeo Das, and was purchased by the present plaintiff, Kishan Lal, who, on the 9th July 1885, obtained possession. At the sale in execution of Hazari Mal's decree, no notification was made of the bond of the 18th October 1875, or of the decree obtained thereon by Nathu Ram on the 27th January 1883. It appeared that the Sub-Registrar in whose office the bond was registered had erroneously reported that there were no incumbrances on the property, being apparently misled by the *aliases* of the obligor.

Some time subsequent to the 9th July 1885, Nathu Ram put his decree in execution and caused the shop to be attached in the hands of Kishan Lal under his purchase. Kishan Lal objected to this attachment, but his objection was overruled by the Court executing the decree, on the 27th September 1885. On the 30th October 1886, he instituted the present suit under s. 283 of the

Civil Procedure Code, in the Court of the Subordinate Judge of Aligarh, to establish his right in the shop under his purchase of the 4th March 1885, and to have it declared that the shop was not liable to attachment in execution of Nathu Ram's decree of the 27th January 1883, and was not subject, as against him, either to that decree or to the bond of the 18th October 1875, which it enforced.

The defendants were the representatives of Nathu Ram.

The Court of first instance (Subordinate Judge of Aligarh) held that the plaintiff's purchase of the 4th March 1885 was subject to the incumbrance created in favour of Nathu Ram by the bond of the 18th October 1875 and to the decree thereon of the 27th January 1883, and that the shop was liable to attachment and sale in execution of the decree. He accordingly dismissed the suit.

On appeal by the plaintiff, the District Judge of Aligarh found that there was "not the least reason for believing that the plaintiff did know that the respondent had any lien on the shop" at the time of his purchase, and that he was "a *bonâ fide* purchaser for a good consideration without notice." On the other hand, the Court also found that Nathu Ram was not "guilty of any negligence in failing to notify his lien when the sale of the shop took place," and that at the time of the sale Nathu Ram was "a mortgagee with an antecedent lien on the property established by a decree of the Civil Court." The Court observed—"I apprehend that in a Court of equity in England the appellant would be protected from the attachment of the property by the respondent, but from the case *Durga Prasad* v. *Shambhu Nath* (1) it appears that this principle is not followed in the Courts in India, and that therefore the appellant's suit must fail. The judgment of the lower Court must be affirmed, and the appeal must be and is hereby dismissed."

The plaintiff appealed to the High Court.

Mr. *A. Strachey* and Munshi *Ram Prasad*, for the appellant.

(1) I. L. R., 8 All., 86.

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Munshi *Kashi Prasad* and Babu *Jogindro Nath Chaudhri*, for the respondents.

For the appellant, it was contended that the rights created in favour of Nathu Ram by the instrument of the 18th October 1875, and the decree thereon were those of the holder of a charge only, as distinguished from the holder of a simple mortgage; that to constitute a simple mortgage, as defined in s. 58 *b*) of the Transfer of Property Act (IV of 1882), words expressly or impliedly conferring upon the obligee a right of sale (which right, it was admitted, could only be exercised through a suit in Court) in default of payment were essential; that the words "*arh*" and "*mustaghraq*" (unlike the word *rehn*) did not constitute a mortgage because they did not expressly or impliedly refer to sale or give the right of sale on default, but merely effected a charge upon the property within the meaning of s. 100 of the Transfer of Property Act; and that the rights of a charge-holder, as distinguished from a simple mortgagee, amounted only to an equitable lien, or a trust, which could not be enforced as against a *bonâ fide* purchaser for value without notice. In support of these propositions the following authorities were cited:—Transfer of Property Act, ss. 40, 58, 69, 100; *Rangasami* v. *Muttu Kumarappa* (1), *Aliba* v. *Nanu* (2), *Khemji Bhagvandas Gujar* v. *Rama* (3), *Govind Bhaichand* v. *Kalnak* (4), *Moti Ram* v. *Vitai* (5), *Gopal Pandey* v. *Parsotam Das* (6), *Sheoratan Kuar* v. *Mahipal Kuar* (7), *Sheo Dayal Mal* v. *Hari Ram* (8), *Bunseedhur* v. *Heera* (9), *Ramsidh Pande* v. *Balgobind* (10), *Varden Seth Sam* v. *Luckpathy Royjee Lallah* (11), *Kinlock* v. *The Collector of Etáwah* (12) read with s. 56 of Act XVIII of 1873, *Dayal Jairaj* v. *Jivraj Ratansi* (13), *Girdhar Ranchoddas* v. *Hakamchand Revachand* (14); Rashbehary Ghose's Law of Mortgage in India (second ed.), pp. 124, 125, 323-325, 445,

(1) I. L. R., 10 Mad., 509.
(2) I. L. R., 9 Mad., 218.
(3) I. L. R., 10 Bom., at pp. 526, 527.
(4) I. L. R, 10 Bom., 592.
(5) I. L. R., 13 Bom., at pp. 99, 100.
(6) I. L. R, 5 All., at pp. 127, 128.
(7) I. L. R., 7 All., at pp. 262, 265.
(8) I. L. R., 7 All., 590.
(9) 1. N.-W. P. H. C. Rep., 74.
(10) I. L. R., 9 All, 158.
(11) 9 Moo. I. A., at p. 307.
(12) I. L. R., 3 All., 433.
(13) I. L. R., 1 Bom., 237.
(14) 8 Bom., H. C. Rep., 75.

446, 447, 499. Shephard and Brown's Commentaries on the Transfer of Property Act, pp. 107-109, 188, 189. Fisher on Mortgages, vol. i; Snell's Principles of Equity (5th ed.), pp. 333-336; Story's Equity Jurisprudence (Grigsby's ed.), pp. 331, 332, 856, 857, 848; Addison on Contracts, pp. 593, 619; Indian Trusts Act (II of 1882), ss. 63, 64. With reference to the extent to which various equitable liens are enforceable against subsequent *bonâ fide* transferees, the following authorities were quoted:—Transfer of Property Act, ss. 39, 55 (4)(*b*), (6)(*c*); White and Tudor's Leading Cases in Equity, vol. i, p. 267; Rashbehary Ghose, pp. 322, 333, 440, and Shephard and Brown, pp. 54, 94. *Shib Lal* v. *Ganga Prasad* (1) was distinguished, upon the construction of the deed by the majority of the Full Bench in that case at p. 553. It was contended that in *Durga Prasad* v. *Shambhu Nath* (2) the principle applied by Courts of equity was wrongly stated; but in any event that case was distinguishable, the transaction there being undoubtedly a mortgage.

YOUNG, J.—Kishan Lal, appellant, was auction-purchaser in 1885 (4th March) of a shop belonging to one Baldeo *alias* Bal Kishan, of which he got possession on the 9th July 1885.

The said Baldeo had previously, *viz.* on the 18th October 1875, hypothecated the same shop to one Nathu Ram (whose representatives are the present respondents). He had also mortgaged it to one Dalchand for a large sum in 1879.

On 27th January 1883, Nathu having sued Baldeo (*alias* Bal Kishan) and Dalchand on the above bond of the 18th October 1875, obtained a decree against them and proceeded to attach the shop in execution of his decree. Kishan Lal objected that he had bought it at auction in execution of Hazari Lal's simple money decree against Baldeo Das.

The lower appellate Court finds that Nathu Ram is not chargeable with fraud, deceit or *laches*, and that he was not bound to disclose his prior lien to the appellant. On the other hand, the Court finds as a fact that appellant was an innocent purchaser for value without

(1) I. L. R., 6 All., 551. (2) I. L. R., 8 All., 86.

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notice. The Court following the ruling in *Durga Prasad* v. *Shambhu Nath* (1) dismissed plaintiff's, appellant's, appeal.

Against that decision the present appeal is brought.

The sale at the auction in 1885 was the sale of the debtor's interest at that time and no more. That interest in 1885 was subject to the respondent's lien under the bond of the 18th October 1875, which lien had been affirmed by the decree of January 1883.

It is, however, strongly urged upon us here that the bond of the 18th October 1875, did not amount to a simple mortgage, as defined in the Transfer of Property Act (IV of 1882), s. 58, and merely created a charge of the character described in s. 100 of that Act, and that such charge would not be enforceable as against a subsequent innocent purchaser for value without notice, although a mortgagee under a simple mortgage would be so preferred. It was contended that the law on this matter in force prior to the passing of Act IV of 1882, was practically the same as that which was formulated by that Act, and the learned counsel for the appellant endeavoured to establish the proposition that documents wherein the power of sale was not expressly given did not amount to mortgages, but only created a charge or lien on the property in question. Mr. *Strachey* (for appellant) admitted that the word "*rehan*" occurring in a document to denote the nature of the incumbrance created, would suffice to show it was a mortgage, and would give the prior incumbrancer a preferential title to the subsequent innocent purchaser for value without notice.

But he contended that no such inference would arise where the document used words such as are here employed, *viz.*, "*ark*" and "*mustaghraq*" and, as here, conveyed no express power of sale in case of default.

The whole subject was considered by us at much length, and the very numerous authorities quoted by the learned counsel for the appellant and the able arguments based by him thereon were carefully weighed.

(1) I. L. R., 8 All., 86.

The primitive meanings of words sometimes assist in the better comprehension of their secondary significations. I do not know that we are much aided in the present instance by the original derivations of the terms used in the documents before us. "*Arh*" denotes a "support" or "propping up;" "*mustaghraq*" is literally "submerged."

There is a clause against alienation during the continuance of the debt, but the document contains no express provision conferring the power of sale in default. I give the document itself as follows :— (His Lordship here read the bond of the 15th October 1875 above set forth, and continued :—)

The learned counsel Mr. *Strachey* for appellant contended that the bond of 1875 in favour of Nathu Ram did not transfer any interest in the property to the obligee and merely amounted to a charge thereon, and that on this ground the appellant, the innocent purchaser without notice, had a preferential claim to the respondent whose incumbrance amounted (as he alleged) to a mere lien on the property. He pointed out that the remedy by sale of the property would be alike whether the incumbrance were by way of mortgage or by mere charge on the property.

He admitted that where the transaction amounted to a mortgage, and certainly if the word "*rehan*" was used to denote the nature of the incumbrance, there the incumbrancer had a preferential title to the innocent purchaser without notice; but he contended that the words employed in the document of 1875, "*arh*" and "*mustaghraq*," did not amount to a mortgage, and merely constituted a lien or charge on the property which would not give respondent any preferential title to the appellant.

The principles laid down in the Transfer of Property Act (IV of 1882) were examined, and the term "simple mortgage," as defined in s. 58 of that Act, was considered and contrasted with "charge" as defined in s. 100 of the Act.

S. 58 lays down that a simple mortgage is "where without giving possession of the mortgaged property the borrower agrees expressly

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or impliedly that in the event of his failing to pay according to his contract the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied so far as may be necessary in payment of the mortgage money."

A "charge" is defined as follows in s. 100 :—

"Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property."

The words "hypothecation" and "lien" which were also freely used during the argument, do not appear to be terms used in the Transfer of Property Act. A "charge" in strictness not only empowers its possessor in many cases to hold the property charged, if in his possession, but also gives him the right to come into Court and sue actively for the satisfaction of his claim. A "lien" strictly is neither a *jus in re* nor a *jus ad rem*, but is simply a right to possess and retain property until some charge attaching to it is paid or discharged (Story, Equity Jurisprudence, s. 506; V. S. Doraiswami Aiyar, Commentary on Act IV of 1882, p. 140). *Rangasami* v. *Muttu Kumarappa* (1) was quoted, where the question was whether a certain bond amounted to a mortgage or not. The document being in a language prevalent in Madras, it is of course only possible to judge of its tenor from the English translation given of it in the judgment, and this is the less satisfactory in regard to the question of its applicability to the case before us, as the point in issue before us is as to the scope and significance of the words "*arh*" and "*mustaghraq*," employed in the deed of 1875, it being admitted that if the word "*rehan*" had been employed instead of "*arh*" and "*mustaghraq*," then no doubt could have remained as to the document amounting to a mortgage. In the Madras case just cited, the bond, which was of the 1st June 1862, is called a hypothecation bond and runs :—"Having pledged to you this day, &c., &c., the brickbuilt house, &c., &c." No power of sale was expressly given.

(1) I. L. R., 10 Mad., 509.

Mr. Justice Kernan held it was not a mortgage, adding however the significant remark—"The term 'mortgage' has not, I am informed, any corresponding vernacular term denoting a transfer of land as security." His Lordship expressed his dissent from the Allahabad High Court's ruling in *Shib Lal* v. *Ganga Prasad* (1), but concurred with the Bombay High Court in *Lallubhai* v. *Naran* (2). His Lordship Muttuswami Ayyar, J., said that the substantial question for consideration was whether the hypothecation bond in suit operated "to create only a charge on immoveable property or a simple mortgage within the meaning of the Transfer of Property Act," and he concluded that it created a charge only. With much respect to the learned Judges I venture to think that the question before the Court was hardly whether the bond of 1862 operated to create a charge or a simple mortgage, as defined by the provisions of an Act which came into force twenty years subsequently; but rather (as indicated by the same Judge himself) what was the intention of the parties at the date of the execution of the bond, and what was the proper construction of the document, having regard to the terms employed, and to the sense in which such terms were ordinarily used at such date; and this seems to me precisely the question for determination in the case now before us.

Another Madras ruling, to a similar effect to that in I. L. R., 10 Mad. just quoted, was also cited, *Aliba* v. *Nanu* (3).

The learned counsel for the appellant reiterated his argument that there must be a distinct grant of the power of sale in order to bind an innocent purchaser for value without notice, and that a charge, while creating a trust against the obligor, went no further and could not be enforced against an innocent purchaser for value without notice, and in support of these propositions quoted Story on Equity Jurisprudence, ss. 1217-1231, and Dr. Rashbehary Ghose's Law of Mortgage in India, p. 322. *Khemji Bhagvandas Gujar* v. *Rama* (4) was next cited. There the Court declined to recognise certain deeds as being mortgage deeds, although they were so called in the deeds themselves, and the Court held that the creditor had a

(1) I. L. R., 6 All., 551.
(2) I. L. R., 6 Bom., 719.
(3) I. L. R., 9 Mad., 218.
(4) I. L. R., 10 Bom., 519.

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mere charge upon the property and that no interest "in the land was transferred to him such as is transferred by a power of sale in an ordinary mortgage" (p. 527).

The next authority which came under our consideration was the Full Bench ruling in *Gopal Pandey* v. *Parsotam Das* (1).

There the question was whether the hypothecation of his right of occupancy by an occupancy tenant was or was not a "transfer" of such right within the meaning of s. 9 of the N.-W. P. Rent Act of 1873, and their Lordships held (my brother Mahmood dissenting) that such hypothecation was not a "transfer." In that case Mahmood, J., said (and with that opinion I entirely concur):—"But it may be safely taken that the word 'transfer' is used in law in the most generic signification comprehending all the species of contract which pass real rights in property from one person to another" (p. 137).

Another passage (p. 138) appears to me worthy of quoting. Mahmood, J., goes on to say :—"The most essential of the elements which constitute the simple mortgage is the right to cause the property to be sold, a right without which the transaction, whatever else it may be certainly cannot be called hypothecation, pledge or simple mortgage."

This appears to me to point to the right path to be taken in answering the question before us. What we have to see is, not what is the necessary and logical effect of the definitions of simple mortgage and charge in the Transfer of Property Act, but was what the intention of the parties in 1875 when they wrote the deed before us.

And here I must remark that we have no right to assume that, prior to Act IV of 1882, the notions of "charge," "lien," "incumbrance," "hypothecation," familiar to English lawyers were equally familiar to the native mind, much less that these terms bore precisely the same connotation to native as to English lawyers. Indeed if we examine s. 100 we shall even yet fail to find a definition

(1) I. L. R., 5 All., 121.

of "charge" as contradistinguished from "lien," the former denoting a result of the act of parties, while the latter is restricted to a liability arising by statute. Nor could terms be easily found in Urdu to express such distinctions except by a periphrasis. I do not say that the idea of a charge is wholly unknown to native lawyers. No doubt the claim of a Hindu widow to maintenance would be in the nature of a charge or lien on the estate (so would be *malikána* and other *haqq)*. It might be held that such a charge as that for maintenance by a Hindu widow would not be preferred to the title of an innocent purchaser for value without notice. But such a charge would certainly not be described by the terms "*arh*" and "*istighraq.*"

Those words are to the best of my belief terms ordinarily employed by native lawyers to denote a mortgage without possession. I consider that, with this exception, they have as much force as the word "*rehan,*" and imply the power of sale in default equally with that word. This to my mind is a complete answer to the question before us. If the terms employed impliedly give the power of sale, and I hold they do, then this document is a simple mortgage even under the definition of s. 58 of Act IV of 1882, and the incumbrancer holding under it has undeniably a preferential title to the innocent purchaser for value without notice.

Sheoratan Kuar v. *Mahipal Kuar* (1) was cited. I refer to it chiefly on the ground that it was therein held that "a simple mortgage is a transfer, being a transfer of the right of sale." In that case it was held that a simple mortgage was effected by the instrument, which was of similar character to the one now before us, save that in the case I am quoting *(Sheoratan Kuar* v. *Mahipal Kuar)* the word "*rehan,*" *i.e.,*" mortgage," was used. The case of *Shib Lal* v. *Ganga Prasad* (2) was much discussed. The Full Bench of this Court in that case held that a similar instrument to the one now before us operated to create a simple mortgage within the meaning of the Transfer of Property Act. In that case my brother Mahmood in interpreting the meaning of the terms used in

(1) I. L. R., 7 All, 258. (2) I. L. R, 6 All., 551.

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the document, the basis of the suit, said as follows (v. p. 556):—"There can be no doubt that the deed of the 20th December 1869, to which this reference relates, is a deed of hypothecation or simple mortgage, the covenant against alienation taken with the word '*adh*' which occurs in the deed placing the matter beyond question." In *Motiram* v. *Vitai* (1) where certain landed property was mortgaged as security for a debt, but the deed contained no express power of sale, it was held by the Full Bench that the document was a mortgage and not a deed of charge merely.

In *Varden Seth Sam* v. *Luckpathy Rojee Lallah* (2) their Lordships of the Privy Council upholding an equitable lien by deposit of title deeds as against one claiming to be a *bonâ fide* purchaser for value without notice, remarked:—"To give effect to the legal estate as against a prior equitable title, would be an adoption of the English law, and to adopt it, and yet reject its qualifications and restrictions, would be scarcely consistent with justice."

In *Durga Prasad* v. *Shambhu Nath* (3) the Court held that "the principle on which Courts of Equity in England refuse to interfere against *bonâ fide* purchasers for a valuable consideration without notice when clothed with the legal title, has no applicability in our Courts."

The case so far differs from the present one, as in the former there was no question that the document, the basis of the suit, created a valid mortgage.

A consideration of the foregoing cases and of the facts of the present appeal leads clearly to the following conclusions.

The definitions of Act IV of 1882, however useful in illustrating principles, can clearly not have retrospective effect and (as expressed by Muttuswami Ayyar, J., in I. L. R., 10 Mad., 515) "prior transactions must be interpreted according to the intentions of the parties at the time they were concluded."

Granting then that an innocent purchaser for value without notice may well be allowed preference where the nature of the

(1) I. L. R., 13 Bom., 90. (2) 9 Moor. I. A., p. 307.
(3) I. L. R., 8 All., 86.

incumbrance set up against him is merely that of a "charge" on the property not amounting to a mortgage, and even further conceding that a mere covenant against alienation without more will not suffice to constitute a mortgage, we have still in this case to look at the terms of the document of 1875, and to decide what was the intention of the parties at the time they executed it.

Looking at the document as a whole and considering the meanings, both primitive and secondary, of the terms employed, *viz.*, "*arh*" and "*mustaghraq*," I have no doubt whatever that it was intended to effect a mortgage without possession of the property named therein, and I think it did effect such mortgage.

I think the power of sale is impliedly given by reason of the force of the words *arh* and *mustaghraq* themselves, and I think that to rule that these words merely constituted a charge on the property as a charge is understood by English lawyers is to import a meaning into these Hindustani words which they were never intended to bear and which they do not bear.

For these reasons I would confirm the judgment below, and dismiss this appeal with costs.

MAHMOOD, J.—This case has been very ably argued by Mr. *Strachey* on behalf of the appellant, and in dealing with his contention I wish to say at the outset that I entirely agree with my brother, Young, in thinking that the fate of this appeal depends upon the interpretation of the effect of the hypothecation deed in favour of Nathu Ram dated the 18th October 1875, on which he obtained the decree of the 27th January 1883, against the obligor Balkishan *alias* Baldeo. That decree directed specific enforcement of the hypothecation by sale of the hypothecated property, and in execution thereof the property having been attached, the plaintiff-appellant's objections founded on his auction purchase of the 4th March 1885, were disallowed by the Court executing the decree on the 27th September 1885. It was to set aside that order and to obtain release of the property from attachment that this suit was instituted on the 30th October 1886, against the decree-holder Nathu Ram, who is now represented by the respondents.

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The lower Courts have concurred in holding, on the one hand, that Nathu Ram's hypothecation deed of the 18th October 1875, was a genuine and *bonâ fide* transaction, as also the decree which he obtained on that deed on the 27th January 1883, and on the other hand, that the plaintiff's auction purchase of the 4th March 1885 was made by him *bonâ fide* for valuable consideration and without notice of Nathu Ram's hypothecation deed of the 18th October 1875 and decree of the 27th January 1883.

These findings of fact cannot be questioned in second appeal, and they furnish the basis of Mr. *Strachey's* argument on behalf of the appellant. The learned counsel contends that the hypothecation bond of the 18th October 1875, did not amount to "a simple mortgage," within the meaning of cl. *(b)* of s. 58 of the Transfer of Property Act (IV of 1882); that therefore the decree of the 27th January 1883, cannot be regarded a decree enforcing sale in pursuance of a mortgage; that the deed only created a "charge" such as that contemplated by s. 100 of that Act; that it therefore did not amount to the transfer of an interest in immoveable property, but only to such an obligation annexed to ownership of immoveable property as would fall under the purview of the second paragraph of s. 40 of the Act, and under the last part of that section could not follow the property in the hands of a *bonâ fide* transferee for value who took without notice of the charge, such as the plaintiff-appellant in this case.

This contention is supported by citation of many rulings which have been noticed by my brother, Young, in his judgment; but I do not think it necessary for me to consider all of them in detail, as I agree with my learned brother in thinking that the intention of the parties as expressed in the deed of the 18th October 1875, amounted to what is known in this part of the country as hypothecation or simple mortgage of which a clear definition is given in cl. *(b)* of s. 58 of the Transfer of Property Act (IV of 1882). That definition is only a reproduction of older law and is therefore applicable to the deed now in question though it was executed in 1875. Viewing the deed in this light it is true that it does not contain any

express words giving the obligee the power of bringing the property to sale as the means of securing payment of the money advanced, but I think there is sufficient language in the deed to show that such power is implied. In the first place the transaction is described as "*arh*," "*mustaghraq*," which means a hypothecation or simple mortgage, and in the next place, the deed contains a covenant against alienation till payment of the loan, and then goes on to say, "if the hypothecated property *(shai mustaghriqa)* is destroyed by some unforeseen calamity or proves insufficient for the bond debt," then the creditor can recover it from the other property of the executant. This, I think, clearly implies power of bringing the property to sale, because that is the creditor's remedy for recovery of money advanced under a transaction of "*arh*" in this part of the country, and in this deed the meaning is further made clear by the use of the word *mustaghraq*, which implies hypothecation or simple mortgage.

But against this interpretation Mr. *Strachey* argues that neither the word "*arh*" nor the word "*mustaghraq*" is the specific term for mortgage (for which the word is "*rehan*"); that they only mean security by hypothecation, which in the absence of a clear indication of a power of sale amounts only to a charge such as s. 100 of the Transfer of Property Act contemplates.

In order to deal with this contention it will be convenient to consider how the matter is dealt with in the Transfer of Property Act, and I cannot do better than quote a passage from the judgment of Mr. Justice Muttuswami Ayyar in *Aliba* v. *Nanu* (1) where that learned Judge says:—"S. 58 defines a mortgage to be the transfer of an interest in immoveable property for the purpose of securing the payment of money, but cl. *(b)* defines a simple mortgage to be one in which there is no delivery of possession of the mortgaged property, but in which the mortgagor binds himself to pay the debt personally, and agrees expressly, or impliedly, that, in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold

(1) I. L. R., 9 Mad 218, at p 221.

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and the proceeds of the sale to be applied, so far as may be necessary, in payment of the mortgage money. In s. 100, a charge is defined to arise where immoveable property of one person is, by the act of parties or operation of law, made security for the payment of money to another, and the transaction does not amount to a mortgage. The distinction then between a simple mortgage and a charge consists in this, *viz.*, where a power of sale is conferred upon the mortgagee expressly or impliedly by the instrument of mortgage, the transaction is a mortgage; otherwise it only creates a charge."

I concur in this statement of the effect of s. 58, cl. *(b)*, and s. 100 of the Transfer of Property Act, and I also agree in the distinction pointed out between a simple mortgage and charge, and in order to make the distinction clearer I may here adopt the language of Dr. Rashbehary Ghose in his note on s. 100 of the Transfer of Property Act (1), where the learned author says:—"A charge must be distinguished from a mortgage as defined in the Act, more specially from a simple mortgage. In every mortgage there must be a transfer of an interest in specific immoveable property, while in the case of a mere charge no interest is transferred, nor is it necessary that the property to which it relates should be specific. A charge differs from a mortgage not only in form, but also in substance. A plea of purchase for value without notice, for instance, although it may be perfectly good against a charge, will be wholly unavailing against a mortgage."

Whilst such is the distinction between a charge and a simple mortgage, Mr. *Strachey* in support of his contention relies upon a passage in the judgment of Mr. Justice Muttuswami Ayyar in *Alila* v. *Nanu* (2), where that learned Judge observed:—

"Prior to Act IV of 1882 the obligor had only the rights of an ordinary debtor under a hypothecation deed. On the one hand, he had no right of redemption, whilst on the other the obligee had no power of sale as inherent in the contract. If the Courts ordered a sale, they did so as it was the only mode in which a charge could be

(1) Tagore Law Lectures, 1875, 6 ed., 2, p. 499.

(2) I. L. R., 9 Mad. 218, at p. 222.

enforced. There is no doubt that Act IV of 1882 affects the Act of Limitation as to mortgages executed subsequently to July 1882, but, as already remarked, it does so by creating new rights and liabilities in the obligor and obligee with reference to those mortgages. In this view it seems to me that Act IV of 1882 could have no retrospective operation, and I hold therefore that the claim for the sale of the hypothecated property was one to enforce a charge, that it falls under art. 132, and that the hypothecation on which it is based does not possess the properties with which mortgages executed subsequent to the 4th July 1882, are invested by Act IV of 1882."

But there are even stronger observations than these in favour of Mr. *Strachey's* contention, made by the same learned Judge in the Full Bench case of *Rangasami* v. *Muttu Kumarappa* (1), where in interpreting a deed in which the words, "hypothecation" and "pledge" were used as representing the transaction, but no power of sale was expressly given to the obligee, the learned Judge said :—

"The transaction is, I think, clearly not a simple mortgage as defined in s. 58 of that Act. There is neither the transfer of property mentioned in that section, nor a special agreement whereby the creditor acquires a power to sell the hypothecated property on default of payment according to the contract. On the other hand, the transaction in suit appears to be of the kind described in s. 100, which defines how a charge is created. It was argued that the Courts used to sell the hypothecated property at the instance of the creditor, and that a power to sell on default might be taken to be inherent in every contract of hypothecation made prior to 1882; but it must be remembered that the power contemplated by the Transfer of Property Act, s. 58, cl. *(b)*, is a power to sell *otherwise* than through the intervention of a Court of justice, and that if the Court directs a sale in the case of a hypothecation bond, it is for the reason that it is the only mode in which the amount charged on immoveable property can be realized." And later on in the same judgment (at page 516) the learned Judge went the length of saying :—"It seems to me that the Transfer of Property Act

(1) I. L. R., 10 Mad. 509, at p. 515.

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does not invest all prior hypothecations with the rights and liabilities arising from simple mortgages, whether or not those transactions satisfy the requirements of the definitions it contains of simple mortgages." Again Mr. *Strachey* relies upon a ruling of the Bombay High Court in *Khemji Bhagvandas Gujar* v. *Rama* (1) where Birdwood and Jardine, JJ., said :—

"And exhibit No. 3, with which we are more immediately concerned, simply recites that the land stands security for the money under it. The property is also spoken of as mortgaged; but the word must be construed as meaning only that the land has been made security for the payment of the money, so that the creditor has a charge upon the property within the sense of s. 100 of the Transfer of Property Act (IV of 1882). He has the right to have his charge realized by sale under a decree, but he is not a mortgagee, as no power is given him expressly or by implication to sell the property out of Court. Until he obtains a decree against the land, no interest in it is transferred to him such as is transferred by a power of sale in an ordinary mortgage."

Now there can be no doubt that if these rulings of the Madras and Bombay High Courts are to be accepted as governing the decision of this case, the deed of the 18th October 1875 must be regarded as creating nothing more than a charge which could not prevail against a *bonâ fide* transferee for value without notice, such as the plaintiff-appellant in this case. But I cannot accept those rulings as applicable in this case, partly because they seem to be affected by considerations relating to the nature and incidents of hypothecation peculiar to those Presidencies, and partly because, I respectfully think, they proceed upon a misapprehension of the nature of the power of sale as contemplated by cl. *(b)* of s. 58 of the Transfer of Property Act. So far as the Madras cases are concerned, the passages which I have quoted from the judgment of Mr. Justice Muttuswami Ayyar would go to show that in that Presidency no such thing as hypothecation carrying with it as a necessary incident the power of bringing the property to sale ever

(1) I. L. R., 10 Bom., 519.

existed before the Transfer of Property Act, and that therefore cl *(b)* of s. 58 of that enactment was the introduction of new law. The same is possibly the case in Bombay, because there, as the passage which I have quoted from the judgment of Birdwood and Jardine, JJ., would show, even the use of the word mortgage coupled with the expression security would not amount to a simple mortgage within the meaning of cl. *(b)* of s. 58 of the Transfer of Property Act. Such is not the case in this part of the country, for here words of hypothecation and simple mortgage have always been understood to import the right of the mortgagee to bring the property to sale for satisfaction of his claim, and no express words conferring such power are insisted upon as necessary to create such power. Upon this point the ruling of this Court in *Martin* v. *Pursram* (1), which was followed by a Full Bench of the Calcutta High Court in *Raj Coomar Ram Gopal Narain Singh* v. *Ram Dutt Chowdhry* (2) and other cases which I shall presently refer to, are clear authorities.

The other reason why I respectfully decline to adopt the Madras and Bombay rulings above-mentioned is that in the passages which have been relied upon by Mr. *Strachey*, and which I have quoted, the learned Judges seem to have held that the power of sale contemplated in cl. *(b)* of s. 58 of the Transfer of Property Act must be a power in the mortgagee to bring the property to sale independently of the Court. Mr. Justice Muttuswami Ayyar in *Rangaswami* v. *Muttu Kumarappa* (3) in answering the contention that the right of sale was an incident inherent in every hypothecation, said :—"But it must be remembered that the power contemplated by Transfer of Property Act, s. 58, cl. *(b)*, is a power to sell, *otherwise than through the intervention of a Court of Justice.*" Similarly Birdwood and Jardine, JJ., in dealing with a similar contention in *Khemji Bhagvandas Gujar* v. *Rama* (4), observed "He has the right to have his charge realized by sale under a decree, but he is not a mortgagee, as no power is given him, expressly or by implication, to sell the property out of Court." Again Birdwood, J., in the later

(1) N.-W. P. H. C. Rep. (1867), 124.
(2) 13 W. R., 82 F. B.
(3) I. L. R., 10 Mad., 509.
(4) I. L. R., 10 Bom., 519, at p. 527.

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case of *Motiram* v. *Vitai* (1) pointed out (at p. 100) that this view was in accordance with the dissentient judgment of Petheram, C.J., in the Full Bench case of *Sheoratan Kuar* v. *Mahipal Kuar* (2), where that learned Chief Justice (at p. 266) said:—

"A reference to s. 100 of the same Act shows that according to the law of this country, immoveable property may be made the subject of a security by a transaction which may not be a mortgage, *i.e.*, by a transaction which does not transfer *to the lender* any interest in the land itself. The question then comes to this, Does the bond in question, either expressly or impliedly, *give the lender himself* any right to cause the property to be sold, or in other words, to *sell it himself*? as if it does not, it transfers no interest in the property and is not a mortgage but a charge."

With due respect to the learned Judges who have thus interpreted the power of sale as contemplated in cl. *(b)* of s. 58 of the Transfer of Property Act to mean a power to sell the property without the intervention of the Court, I am unable to accept their interpretation. The exact words in the clause are:—"the mortgagee shall have a right to cause the mortgaged property to be sold," and s. 67 clearly shows that such power is to be exercised by obtaining from the Court "an order that the property be sold." The use of the phrase, "to cause," taken with the provisions of s. 67 as to order for sale, clearly shows that in a simple mortgage the mortgagee's power of sale is not intended to be exercised independently of the Court. If any doubt could exist upon the point it is removed by the express provisions of s. 69, which, in dealing with the matter, lays down that a power of sale "without the intervention of the Court is valid in the following cases and *in no others*," and the cases enumerated in the section do not include simple mortgages, as defined in cl. *(b)* of s. 58. It is therefore clear that in order to constitute a simple mortgage an express or implied power of sale exercisable through the Court is all that is required, and that it is none the less a mortgage, if it conveys no power to the mortgagee to sell the property out of Court, a power which, as I have shown, could

(1) I. L. R., 13 Bom., 90. (2) I. L. R., 7 All., 258.

not be valid in such mortgages. This view is in accord with the doubt expressed by Sargent, C.J., in *Motiram* v. *Vitai* (1) as to the accuracy of the ruling in *Khemji Bhagvandas Gujar* v. *Rama* (2) for he observed:—"It is to be remarked that in *Girwar Singh* v. *Thakur Narain* (3) the High Court of Calcutta treat the document in that case, which was a simple mortgage in the same form as exhibit 3, the subject of discussion in *Khemji Bhagvandas* v. *Rama* (2), as a mortgage within the contemplation of the Transfer of Property Act, and it is certainly very difficult to suppose that the framers of that Act intended to exclude from their definition of mortgage a large class of instruments which were not only in every day use, but regarded and described by the natives of this country as mortgages, and treated as such by all the Courts of the mufassil."

I now proceed to consider some of the rulings of this Court in which the question as to what amounts to a simple mortgage has been discussed. In the case of *Gopal Pandey* v. *Parsotam Das* (4) a Full Bench of this Court had to consider whether a hypothecation by an occupancy tenant of his occupancy tenure was a transfer within the meaning of s. 9 of the N.-W. P. Rent Act. The majority of the Court in that case answered the question in the negative, whilst I answered it in the affirmative. In delivering my judgment in that case I went at considerable length into the question (at pp. 136—39) what constituted hypothecation or simple mortgage, and to those views I still adhere, and need not repeat them. Mr. *Strachey*, however, argues that my opinion in that case is no longer available to me as the majority of the Court decided the question in the negative. This at first sight seems to have force, but as a matter of fact, with the exception of Stuart, C.J., who delivered a separate judgment, the opinion of the majority of the Court does not abrogate the opinion which I expressed as to the nature and incidents of hypothecation or simple mortgage, for they only ruled that "transfer" in s. 9 of the Rent Act, meant only an out and out transfer. The ruling of the learned Judges may be quoted here, in their own words. They said:—"What s. 9 aimed at was to prevent occu-

(1) I. L. R., 13 Bom., 90, at p 97.
(2) I. L. R., 10 Bom., 519.
(3) I. L. R., 14 Calc., 780.
(4) I. L. R., 5 All., 128.

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pancy tenants from wholly divesting themselves of their rights of occupancy by out and out transfer to strangers to the exclusion of co-sharers interested by inheritance in such right." Beyond this the ruling has never been understood to govern questions of mortgages, and its effect has been strictly limited to the interpretation of s. 9 of the Rent Act by this Court itself.

This appears from the Full Bench ruling in *Shib Lal* v. *Ganga Prasad* (1), where a deed such as the one in this case which employed the word *ark* with a covenant against alienation was accepted as amounting to a simple mortgage within the meaning of cl. *(b)*, s. 58 of the Transfer of Property Act. Again, in *Sheoratan Kuar* v. *Mahipal Kuar* (2) a deed worded similarly to that in this case was held by the majority of the Court to be a transfer by simple mortgage within the meaning of cl. *(b)*, s. 58 of the Transfer of Property Act, although the deed did not expressly give power of sale to the mortgagee, and the words "*rehan*" (mortgage) and "*mustaghraq*" were taken to imply a power of sale, though of course not a power of sale without the intervention of the Court. In delivering my judgment in that case I said :—"In some cases, such as those described in s. 69 of the Transfer of Property Act, the mortgagee may sell the property by private sale; in other cases (and this is the rule of simple mortgages in India) his only way of selling the property is to go to the Court to obtain an order for sale. I am of opinion that this distinction between the two forms of mortgage to which I have referred does not place them under different categories, for my conceptions of jurisprudence convince me that both must be classed under the genus of *jura in re alienâ* or estates carved out of the full ownership of property, the object, namely, security of immoveable property for the performance of a pecuniary obligation, being in both cases identical." It seems to me that the question whether the mortgagee's power of sale is to be exercised out of Court or through the intervention of the Court is a matter relating to what may be called the *modus operandi* as distinguished from the essence of the mortgage.

(1) I. L. R., 6 All., 551. (2) I. L. R., 7 All., 258.

There was another point which Mr. *Strachey* urged in support of the appeal. He contended that even if the deed of the 18th October 1875 be taken to amount to a simple mortgage, the fact that the plaintiff is a *bonâ fide* purchaser for value without notice rendered his purchase of the 4th March 1885, free of the prior incumbrance. For this contention the learned counsel relied upon a ruling of the Bombay High Court in *Girdhar Ranchoddas* v. *Hakamchand Revachand* (1) where such a rule seems to have been laid down with reference to the *Gujrati* form of *Sankhat* mortgage, which is apparently similar to a simple mortgage in this part of the country. That ruling, however, has been overruled by a Full Bench of the same Court in *Sobhagchand Gulabchand* v. *Bhaichand* (2) and again by another Full Bench of the same Court in *Naran Purshotam* v. *Daolatram Virchand* (3). There is thus no authority for the proposition that a simple mortgage such as the one in this case is unavailable as against a *bonâ fide* transferee for value without notice.

There is yet another reason why this appeal cannot prevail. The plaintiff in this case is the purchaser of the rights and interests of Balkishan such as they were at the auction-sale of the 4th March 1885. The purchase being in execution of a simple money-decree, the plaintiff could acquire no higher title than the judgment-debtor possessed. This being so, it must be remembered that in respect of this very property Nathu Ram, whom the defendants-respondents represent, had already obtained a decree on the 27th January 1883, against Balkishan. That decree, as has already been observed, was passed on the deed of the 18th October 1875, and is so framed as to order sale of the property in enforcement of a simple mortgage. It is in all respect a mortgage decree. Now this being so, the title of Balkishan was necessarily subject to the decree when it was sold to the plaintiff on the 4th March 1885, and he is equally bound by its terms. In *Unnopoorna Dassee* v. *Nufur Poddar* (4) the Calcutta High Court held that the purchaser of property at an execution sale is the representative in interest of the judgment-

(1) 8 Bom. H. C. R., 75 A. C.
(2) I. L. R., 6 Bom., 193.
(3) I. L. R 6 Bom., 538.
(4) 21 W. R., 148.

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debtor whose right, title and interest he has purchased. In *Rajah Enayet Hossein* v. *Girdhari Lal* (1) the Lords of the Privy Council observed :—

"There is another point which appears to have been taken by the learned Judges of the High Court, and which seems to have been founded on the supposition that there was some distinction to be made in favour of a person claiming under an execution sale as contradistinguished from the representatives of any person claiming under an ordinary assignment or conveyance. In the opinion of their Lordships, there is no foundation in principle or authority for any such distinction, but the person who comes here as the plaintiff, and who is the respondent in this case, must stand in the same position as the son, Bahadur, whose rights he bought would have stood in if he had been the claimant."

It is therefore clear that the plaintiff-appellant is as much bound by the terms of the decree of the 27th January 1883, in respect of the property which he has purchased as Balkishan himself would have been, and cannot therefore prevent the property from being sold under that decree except by paying up the decretal money.

For these reasons I agree with my brother, Young, in dismissing the appeal with costs.

Appeal dismissed. (2)

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(1) 12 Moo I. A. 366.

(2) See also *Cooling* v *Sararana* (I. L. R., 12 Mad., 69), *Golla Chinna Guruoupa Naidu* v. *Kali Appiah Naidu* (4 Mad H C. Rep, 434), *Bapuji Balal* v. *Satya Bhama Bai* (I. L. R, 6 Bom. 490), *Sadagopa Chariyar* v *Ruthna Mudali* (5 Mad. H. C. Rep, 457), *Chetti Gaundan* v. *Sundaram Pillai* (2 Mad. H. C Rep, 51), *Lakshmandas Surupchand* v. *Dasrat* (I. L. R, 6 Bom., 168),

PRIVY COUNCIL.

P. C.
J. C.
1890
July 12.

RADHA PRASAD SINGH, (DEFENDANT) *v.* LAL SAHAB RAI AND OTHERS, (PLAINTIFFS).

[On appeal from the High Court for the North-Western Provinces]

Civil Procedure Code, ss. 13, 43—*Res judicata—Ascertainment of a defendant's liability by an operative decree after the declaration of his general liability in a prior decree—His death in the interval between such decrees, and effect, in execution, of his representatives not being parties to the operative one—Mesne profits—Parties—Non-joinder.*

The dismissal of a suit to have set aside an order made in one district, for the sale of the plaintiff's interest in property therein, is not a bar under ss. 13 and 43, Civil Procedure, to another suit to obtain relief against an order in another district for the sale of property therein belonging to the same plaintiff, or of other property not included in the order or sale against which the dismissed suit was directed.

An operative decree, obtained after the death of a defendant, ascertaining for the first time, the extent and quality of his liability, the latter having been already declared in general terms in a prior decree, cannot bind the representatives of the deceased, unless they were made parties to the suit in which such ascertainment was pronounced.

The question of the amount of mesne profits due, they having been decreed together with the possession of land in 1856, against a body of village proprietors, was not decided till 1877. In that year an operative decree was made against the village proprietors whose names appeared as defendants in the suit of 1856, and in 1881 execution proceedings were taken against the present plaintiffs, attributing to them the character of heirs of the original judgment-debtors.

Held, that the right to execute for mesne profits was not wholly dependent upon whether or not the ancestor of the present plaintiffs had been a party to the decree of 1856, which did not ascertain the amount of the profits, or determine whether the then defendants were liable jointly or severally, in respect of the wrongful possession.

Before the issue of a money decree which was capable of being put into execution, the alleged ancestor of the present plaintiffs was dead, and the latter, not having been parties to that decree, were not liable under it (1).

Present: LORD WATSON, SIR B. PEACOCK, AND SIR R. COUCH.

(1) S. 235 of Act X of 1877 (30th March 1877) enacted that if the decree be for mesne profits, or any other matter the amount of which in money is to be subsequently determined, the property of the judgment-debtor may, before the amount due from him under the decree has been ascertained, be attached as in the case of an ordinary decree for money.

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CONSOLIDATED appeal from two decrees (4th May 1887) of the High Court, one of which reversed a decree (21st July 1885) of the Subordinate Judge of Ghâzipur and decreed the claim of the present respondent. The other dismissed a cross appeal preferred by this appellant to the High Court.

The plaintiffs, in the suit out of which this appeal arose, and their predecessors in estate, were pattidârs of village Narhi, in the Ghâzipur district, their village having originally comprised mauza Umarpur, which, about the year 1840, was cut away from Narhi by the river Ganges, re-appearing some years after as diyara, or alluvial land, on the opposite, or Shahabad, side of the river. The defendant was the Mahârâja Radha Prasad Singh, the proprietor of taluk Majhariya, in the Shahabad district. The litigation which took place about Umarpur diyara, between the defendant's father and the proprietors of Narhi, 264 in number, is stated in the judgment of the Sadar Diwani Adalat of 29th November 1859, reported in the S. D. A. reports for that year. The result was a decree in favour of the Maharaja, for the possession, with mesne profits, of about 1,589 bighas, and he obtained possession in 1874. Meantime, an order of the Government had placed Umarpur diyara within the jurisdiction of the Shahabad district. On the 1st March 1877 a decree was made by the Shahabad Court fixing the amount of mesne profits and costs at Rs. 10,69,667, to satisfy which, an order was made in June 1878, also by the Shahabad Court, for the attachment of the interest of the decree debtors in Umarpur. On the 23rd June 1880, the present respondents filed their plaint against this appellant (who had succeeded his father as talúkdár) in the Court of the Subordinate Judge of Shahabad to have set aside the sale of their share in Umarpur, on the ground that neither they, nor any of their ancestors, were judgment-debtors in the decree held by the Mahârâja. On the 21st July 1881, the Subordinate Judge dismissed that suit, with costs on grounds which he stated thus :—

"The case having come on to-day, an application has been made that the plaintiffs being residents of another district on the other side of the river could not attend, for what reason it was not

known, and it prayed for one month's time, and for the appointment of another date. This is not a sufficient cause. Two weeks have passed since the framing of the issues and the plaintiffs have done nothing towards the conduct of their case. Now one month's time cannot be allowed. The case should be dismissed for want of evidence."

The case having thus terminated in Shahabad, afterwards, on the 10th March 1881, the District Judge of Ghâzipur made an order, on the application of the Mahârâja, for execution of the decree of 1877, by attachment of lands in Narhi. Objections having been disallowed, the plaintiffs in this suit, describing themselves as "sons of Jaiparkash," who, in fact, was the son of Jhanguri, brought this suit on 3rd March 1882. They claimed to be entitled as village shareholders to shares in Narhi, asli and dâkhili, valued at Rs. 74,888, alleging that neither they nor their ancestors were liable for the mesne profits. The Mahârâja's defence was that they were. Execution proceedings had all along been taken against Jhanguri Rai, son of Achraj, as well as other proprietors; and it was contended that it was Jhanguri's son, Jaiparkash, whom the plaintiffs represented. The defence also relied on the dismissal of the suit which had been brought in 1882 in the Shahabad Court, as barring this suit; and on this latter ground the suit was, in the first instance, dismissed by the Subordinate Judge of Ghâzipur, whose decree, however, was on appeal reversed by the High Court, the suit being remanded for hearing on the merits.

On that remand the first Court held that the respondents' "ancestor" or grandfather, Jhanguri, had been a defendant in the suit in which this appellant's decree had been obtained, and that, therefore, his share of one moiety of the properties in suit was liable to be sold in execution of that decree, but that the other half, which under Hindu law belonged to the respondents as grandsons of Jhanguri, was not so liable; and the first Court, accordingly, gave the respondents a decree for the latter half, and declared the other half liable to sale in execution of this appellant's decree.

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Against that decree an appeal and cross appeal were preferred, on which the High Court remanded the suit for the determination and report of the first Court on three issues which were sent down for the purpose of ascertaining more perfectly whether Jhanguri, the respondents' grandfather, was a defendant in the suit, and whether process was served on him, and whether he or his son, Jaiparkash, the respondents' father, or the respondents were parties, at any time, and when, to the execution proceedings prior to the 12th July 1874, the date on which possession was obtained by this appellant of the decreed lands in respect of which the mesne profits were demanded.

On this remand, the first Court took further evidence, and reported that it was shown that Jhanguri, the respondents' grandfather, was at the time of the institution of the suit in which this appellant's decree was obtained, a coparcener, and in possession of the lands decreed; but that this appellant, on whom the High Court had cast the burden of proof, had not satisfactorily shown that any process issued to Jhanguri in that suit, or that any proceedings in execution had been taken against the respondents, or their ancestor, before the 1st of March 1881.

Objections and cross objections were taken to this report, which was returned to the High Court, and the case was re-argued.

The judgment of the High Court, delivered by STRAIGHT, J., concluded thus:—

"To sum the matter up, it comes to this, that the defendant says because there was a mention of the name of Jhanguri, who had a share in this particular village in the year 1856, and because all the co-sharers must be presumed to have been cited in that suit, and because a Jhanguri appears in the decree and in the subsequent execution proceedings, therefore it must be presumed that that Jhanguri is the grandfather of the present plaintiffs. On the other side, the plaintiffs say, and I think with justice, that it is by no means clear that Jhanguri was in existence in the year 1856; there is no proof that he was served with process in that suit before the decree was passed, or that he was subsequently made a party to any

proceedings in execution of the decree: and in this respect the contention is supported more or less by the absence from the decree of any parentage of Jhanguri, and the same remark applies to the execution proceedings, so that under these circumstances it does seem to me to be asking us to take a leap in the dark to come to the conclusion upon such materials that this particular Jhanguri whose name appeared in that decree must necessarily be the Jhanguri the grandfather of the plaintiffs in the present suit. It was urged for the defendant that by the name of Jhanguri appearing in or being mixed up with the names of the other members of the family who were cited in this suit, it must follow that he was the Jhanguri the ancestor of the plaintiffs. I confess it would be going a great deal too far, where there are so many Jhanguris appearing in the decree, and so many repetitions of other names, to come to the conclusion that he was the person the defendant says he was. I think I have said sufficient to explain why I think that there is no clear, satisfactory, or convincing proof which would warrant me in allowing the defendant to proceed with the execution of the decree against the property which is now in the possession of the present plaintiffs."

The decree of the High Court was accordingly in favour of the plaintiffs.

Mr. *R. V. Doyne*, and Mr. *J. D. Mayne*, for the appellant, referred to the decision of the Subordinate Judge of Shahabad of 21st July 1881, dismissing the plaintiffs' suit in that Court; and they referred to ss. 13, explanation 4, and 43 of the Civil Procedure. They also adverted to the evidence relating to Jhanguri having been a party to the decree of 14th April 1856. They contended that had remained a pattidár and coparcener of Narhi, and that the entire interest of the plaintiffs in their ancestral lands was liable to attachment in execution of the decree.

Mr. *J. Graham*, Q. C., and Mr. *H. Cowell* for the respondents, argued that they were not affected by the decree of 1856 or bound by any of the proceedings taken under it. The proceedings taken by the defendant on the 1st March 1881 were not preceded by

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any judicial finding that the present plaintiff represented the real judgment-debtors. The decision of the Shahabad Court had determined none of the issues in the present case and did not constitute *res judicata*.

Mr. *R. V. Doyne* replied.

Their Lordships' judgment was delivered by LORD WATSON.

LORD WATSON.—The suit in which these consolidated appeals are taken was instituted by Lal Sahab Rai and others, the respondents, before the Subordinate Judge of Gházipur in March 1882, for the purpose of obtaining relief against the attachment and sale, at the instance of the Mahárája Radha Prasad Singh, the appellant, of certain shares of immoveable estate in talúka Narhi and elsewhere, in satisfaction of a judgment debt alleged to be due from their ancestor Jhanguri Rai. The respondents are the six sons of Jaipargash, the only son of Jhanguri, who was one of the five sons of Achraj Rai, a pattidár of Narhi; and the shares sold in execution by the appellant were the ancestral property of the respondents, being one-fifth of the interest which belonged to their great-grandfather, Achraj Rai.

In order to appreciate the relative position of the litigants and the merits of the controversy raised by these appeals, it is necessary to revert to the legal proceedings in which the decrees were obtained which formed the warrant for the attachment and sale against which relief is sought.

Talúk Majharya, now belonging to the appellant, and talúk Narhi, already mentioned, are situated on opposite banks of the Ganges, Majharya being on the Shahabad and Narhi on the Gházipur side of the river. Disputes arose between the proprietors of these two talúks with respect to the ownership of 1,589 bighas of alluvial land which had been deposited by the action of the river on its Shahabad side, the proprietors of Narhi, who appear to have been in possession, alleging that the disputed land was a reformation upon a denuded area which originally formed part of their talúk. Consequently the Maháraja Búkhsh Singh, father and imme-

diate predecessor of the appellant, brought, in 1855, an action against 264 defendants pattidárs of Narhi before the Civil Court of Gházipur for recovery of the disputed bíghas and for mesne profits. The judicial record of that action perished in the Mutiny, but copies of the written statement lodged for 57 pattidárs who appeared to defend, of their petition for leave to file documents, and of the ultimate decree passed by the Civil Judge of Gházipur, have been produced and admitted without objection in this suit.

The decree, which is dated the 14th April 1856, assigned the disputed land to the Mahárája, and fixed its boundaries; and also found that he was "entitled to mesne profits from the date of the Deputy Collector's order until he recovers possession." An appeal was taken by some of the defendants to the Sadar Court, who, on the 29th November 1859, varied the boundaries fixed by the Subordinate Judge favourably to the defendants, and directed "that mesne profits be adjusted accordingly." The Mahárája presented a petition for review, upon which the Sadar Court, on the 7th April 1860, modified its previous decision with respect to boundaries, in his favour. An appeal was then taken by the defendants to this Board, which was dismissed on the 31st March 1870 for want of prosecution. It is unnecessary to notice farther these proceedings by way of appeal, because the decrees pronounced in them had reference merely to the extent of the land which the Mahárája was entitled to recover, and did not disturb the general finding of the Subordinate Judge of Gházipur in regard to mesne profits.

It having been judicially determined that the disputed land formed part of talúk Majharya, the action was, after the dismissal of the appeal to this Board, transferred to the Court of Shahabad, the district in which that talúk is situated. In 1874 the Mahárája was put in possession of the land in pursuance of the decree of the Sadar Court; but the question of mesne profits was not finally disposed of until 1877. On the 1st March 1877 the Subordinate Judge issued an order, which has become final, fixing the amount of mesne profits and costs due to the appellant as successor of the Mahárája at Rs. 10,69,667, for which he gave decree jointly against

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all the parties whose names then appeared as defendants to the action.

In June 1878 an order issued from the Shahabad Court for attachment of the interests of the judgment-debtors in mahal Umarpur, in satisfaction of these mesne profits and costs of suit. In the course of the proceedings the respondents applied to have a 2 ganda 2 kauri 2¼ dant share, which they alleged to belong to them, struck out of the inventory; but their objection was overruled, and the property sold in execution. The respondents then brought a regular suit for relief against the attachment and sale, in which they alleged that their share of the mahál was ancestral property, and that neither they nor their ancestors were judgment-debtors in the decree executed, or in any way liable under it. The suit was resisted by the appellant, on the grounds that the respondents had no interest in Umarpur, and that they were not the representatives of Jhanguri and Jaipargash. After adjustment of issues the action was dismissed with costs, on the 21st July 1881, because of the respondents' failure to adduce evidence in support of their allegations; and the respondents took no steps to set aside that order, which has consequently become final. It would hardly have been necessary to refer to these proceedings in execution, had it not been for the fact that the appellant relies upon them as constituting *res judicata* in the present suit.

On the 1st March 1881, the appellant instituted proceedings for execution in the Court of Gházipur against property of the judgment-debtors situated in that district, stating in his application (1) the names of the judgment-debtors, and (2) the names of those against whom his decree was sought to be executed. Amongst the former there occurs the name of "Chakauri Rai," which is synonymous with "Jhanguri Rai;" and amongst the latter the names of all the respondents, who are described as "sons of Jaipargash Rai, deceased, heirs of Chakauri Rai, grandson of Achraj Rai." So that in these proceedings the appellant rightly attributed to the respondents the character of heirs of Jhanguri and Jaipargash, which he denied that they possessed in his previous execution suit. The

respondents lodged objections, praying for release of their interest, on the ground that it belonged to them, "and they were in possession thereof, and the judgment-debtors had no concern with it;" but these objections were repelled by the Subordinate Judge of Gházipur, on the 10th March 1881, in respect of their having been once before raised by the same persons in the Court of the Sub-Judge of Shahabad and there disallowed.

On the 3rd March 1882 the respondents brought the present suit, in which there has been an unusual amount of litigation. Their cause of action is thus stated in the plaint:—"The judgment-debtors have no connection or concern with this property, nor are the plaintiffs or their ancestors debtors under the decree under execution." In his written statement the appellant averred that the decree of 14th April 1856, and subsequent proceedings in execution, were taken against Jhanguri Rai and his son, Jaipargash Rai, and that these persons being judgment-debtors, the property, being ancestral, was liable to attachment for their debt. He also pleaded that, according to the provisions of sections 13 and 43 of Act X of 1877, the claim put forward by the respondents was no longer cognizable, inasmuch as it had already been adjudicated upon, in a regular suit, before the District Court of Shahabad.

The cause was tried upon six issues, which need only be noticed in so far as they relate to the main question raised in these appeals:—

"III. Is the claim of the plaintiffs barred by sections 13 and 43 of the Code of Civil Procedure?

"IV. Are the plaintiffs or their ancestors liable for the judgment debt, and is the property liable to sale or not?"

The Subordinate Judge, upon the 21st December 1882, sustained the appellant's plea in bar, and dismissed the suit with costs. His decree was carried by appeal to the High Court of the North-Western Provinces, by whom it was reversed on the 9th May 1885, and the case remanded to the Sub-Judge for disposal on the merits.

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As the decision of the High Court on that occasion has been impeached in these appeals, it may be convenient to state here that, in the opinion of their Lordships, it was well founded. None of the questions, either of fact or law, raised by the pleadings of the parties, was heard or determined by the Judge of the Shahabad Court in 1881; and his decree dismissing the suit does not constitute *res judicata* within the meaning of the Civil Procedure Court. It must fall within one or other of the sections of Chapter VII of the Code; in the present case it is immaterial to consider which, the severest penalty attached to such dismissal in any case being that the plaintiff cannot bring another suit for the same relief. Assuming that the respondents are barred from seeking relief against the attachment and sale of their interest in mahál Umarpar, the decree of 21st July 1881 does not disable them from claiming relief against the attachment and sale of their interest in Narhi, or in any other property which was not included in the judicial sale of Umarpur.

Acting under the remit made to him by the High Court, the Subordinate Judge, on the 21st July 1885, found as matter of fact that the respondents' ancestor, Jhanguri Rai, was defendant in the suit of 1855, and was one of the parties decerned against, as liable for mesne profits by the judgment of the 14th April 1856. Upon that finding the learned Judge dismissed the respondents' suit with respect to one-half of the interests claimed by them, but sustained it with respect to the other half, which he held to have been vested, by force of Hindu law, in their father, Jaipargash, who was admittedly not made a party to the proceedings of 1855 and 1856 at the instance of the Mahárája. Against that decision both parties appealed to the High Court, who, on the 5th August 1886, made an order remanding the case for the trial of the following points, and distinct findings upon them :—

(1) Was Jhanguri Rai, the grandfather of the plaintiffs, a co-sharer or in possession of the lands to which the litigation of 1855 related, and which ended in the decree of 14th April 1856?

(2) If so, was any process of Court in that litigation issued or served upon him?

(3) When did the defendant first seek to execute his decree against the plaintiffs, either at Gházipur or Shahabad; and were they or any of their ancestors, *viz.*, Jaipargash or Jhanguri, parties to the execution proceedings which ended in possession of the property in suit, to which the decree of 1856 related, being given to the defendant by proceedings which ended on the 12th July 1874?

Their Lordships entertain serious doubts whether the Court was justified in making the remand, by the provisions of section 566 of the Civil Procedure Code. All the points remitted were substantially covered by the issues which had been previously sent for tria in the Court below; and it appears to their Lordships that there were sufficient materials for the decision of the case, to which little or nothing has been added by the evidence taken on remand.

On the 20th November 1886 the Subordinate Judge found upon the several points refered to him by the High Court. Upon the first point he found that Jhanguri was a coparcener and in possession at the dates specified; upon the second, that the issue of process to Jhanguri was not proved; and, upon the third, that it was not clearly proved that Jhanguri was a party to the proceedings in execution which resulted in possession of the disputed property being given to the Mahárája in the year 1874.

These findings, together with the oral evidence taken on remand, were duly submitted to the High Court, who, on the 4th May 1887, reversed the Subordinate Judge's decree of the 21st July 1885, and gave judgment for the respondents in terms of their plaint with costs. The decision of the Court was delivered by Mr. Justice Straight, Mahmood, J., concurring. Their Lordships agree with the conclusion at which these learned Judges arrived, although they are unable to concur in all the reasoning upon which it is based. Mr. Justice Straight says, with reference to a statement made by the respondents' pleader on the 27th September 1882, "It seems to me, so far as the plaintiffs were then concerned or are concerned

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now, the sole position for which they have contended was that their ancestor, Jhanguri, was not the judgment-debtor under the decree of the 14th April 1856." And the learned Judge adds "The whole matter, therefore, between the parties resolves itself into the single question of fact,—Was or was not Jhanguri, the ancestor of the plaintiffs, a judgment-debtor under the decree of the 14th April 1856?" The statement in question was not intended to be, and was not, a rehearsal of the whole facts relied on by the plaintiffs, but was made by their pleader in answer to specific questions put to him by the Subordinate Judge; and the issues which went to trial were not confined to that statement, but raised the general question whether the ancestors of the plaintiffs were judgment-debtors under the decree by virtue of which the respondent had attached and sold their interest in the lands of Narhi and others. That misconception of the real issue probably led to the remand of the 5th August 1886, and it certainly induced the High Court, in its ultimate decision upon the merits of the case, to deal with many points which do not appear to their Lordships to require consideration.

The respondents endeavoured to prove that Jhanguri Rai predeceased his father, Achraj, some time before the year 1840; but their evidence on that point does not appear to be reliable, and their Lordships are disposed to think that the Subordinate Judge was right in holding that Jhanguri was a coparcener in possession at the date of the decree of 1856, and was alive for many years afterwards. The terms of that decree, as well as of the written statement for the defendants, and of their petition for leave to file documents,—in all of which the name of Jhanguri occurs in connection with the whole other descendants and heirs of Achraj Rai then in life,—afford *primâ facie* evidence that he was a party to the suit, and was included in the decree itself. Whether that inference is displaced by antecedent evidence derived from the pattidári papers of 1840, their Lordships do not think it necessary to determine. In their opinion, it is an obvious mistake to assume that the right of the appellant to take the respondent's land in execution for mesne profits wholly depends upon the fact of their ancestor being a party

to the decree of 1856. None of the defendants were, by that decree, made judgment-debtors for mesne profits, in the sense that their property could be attached by virtue of it. The decree, no doubt, found that defendants in the suit were accountable for mesne profits, and by that finding they were bound; but it did not ascertain the amount of such profits, or determine the important question whether the defendants were liable jointly or severally in respect of their wrongful possession. There was no adjudication upon any of these matters until March 1877, when for the first time the appellant obtained a money decree which was capable of being put into execution. But, according to the testimony of the appellant's own witnesses, Jhanguri died at least twelve months before that date. It does not clearly appear whether his son, Jaipargash, was then alive; but it is matter of certainty that neither Jaipargash nor the respondents were made parties to the suit in room of Jhanguri.

An operative decree, obtained after the death of a defendant, by which the extent and quality of his liability, already declared in general terms, are for the first time ascertained, cannot bind the representatives of the deceased, unless they were made parties to the suit in which it was pronounced; and their Lordships will therefore humbly advise Her Majesty that the judgment of the High Court ought to be affirmed. The appellant must pay to the respondents their costs in these appeals.

Appeal dismissed.

Solicitors for the appellant :—Messrs. *Burton, Yeates, Hart*, and *Burton*.

Solicitors for the respondents :—Messrs. *Ranken, Ford, Ford*, and *Chester*.

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CIVIL REFERENCE.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and, Mr. Justice Mahmood.

RADHA BAI (DEFENDANT) *v.* NATHU RAM (PLAINTIFF).*

Stamp—Promissory note not chargeable with duty of 6, 10 *or* 12 *annas—Such promissory note written on impressed sheet of proper value bearing the word "hundi"—Note duly stamped—Act I of* 1879 *(Stamp Act), ss.* 3 (10), 9, 33, 34, 57—*Rules by Governor-General in Council—Notification No.* 1288 *of* 3*rd March* 1882, *Rules* 3, 4, 6—*Notification No.* 2955 *of* 1*st December* 1882, *Rule* 6*A.*

The effect of Notification No. 2955 of the 1st December 1882, amending the Rules made by the Governor-General in Council under s. 9 of the Stamp Act (I of 1879) and published in Notification No. 1288 of the 3rd March 1882, is not to prohibit all promissory notes except those chargeable with a duty of 6, 10 or 12 annas being written on impressed sheets bearing the word "*hundi.*" A Rule which says that certain promissory notes shall be written on impressed sheets bearing the word "*hundi*," cannot be interpreted as enacting that other promissory notes shall not be written on impressed paper of the proper value if it happens to bear the word "*hundi.*"

A promissory note for an amount not exceeding Rs. 200, payable otherwise than on demand, but not more than one year after date, and requiring a stamp of two annas, is duly stamped if written on an impressed sheet of the value of two annas, though that impressed sheet bears the word "*hundi.*"

THIS was a reference to the High Court under s. 617 of the Civil Procedure Code by the Judge of the Court of Small Causes at Allahabad. The order of reference was as follows :—

"This suit is based on an instrument which, according to the terms of it, is a promissory note, containing as it does an unconditional undertaking to pay a certain sum of money to the plaintiff. It is written on an impressed sheet of the value of two annas, bearing the word '*hundi.*'

"The only plea raised on behalf of the defendant is that the instrument is inadmissible in evidence, not being duly stamped according to the rules laid down by the Government of India.

* Civil Reference (Mis. No. 67 of 1890), under s. 617 of the Code of Civil Procedure by Babu Promoda Charan Banerji, Judge of the Court of Small Causes at Allahabad.

"By s. 34 of Act I of 1879, 'no instrument chargeable with duty shall be admitted in evidence,' unless such instrument is duly stamped.'

"Under clause (10) of s. 3, 'duly stamped' means 'stamped or written upon paper bearing an impressed stamp, in accordance with the law in force in British India when such instrument was executed.'

"S. 9 provides that 'all duties with which any instruments are chargeable shall be paid, and such payments shall be indicated on such instruments, by means of stamps *(a)* according to the provisions herein contained, or *(b)* when no such provision is applicable thereto, as the Governor-General in Council may by rule direct.' Rules so framed have by s. 57 the force of law.

"If therefore the instrument on which the claim in this case is founded has not been stamped according to those rules, it is not admissible in evidence.

"I may observe that the instrument in question is not one which might under s. 10 be stamped with an adhesive stamp of one anna.

"The question for consideration is whether the said instrument has been stamped in accordance with the rules made by the Governor-General in Council.

"Those rules were laid down in Notification No. 1288, dated 3rd March 1882, published in page 131 of the *Gazette of India* of that year. Rule 3 prescribes two kinds of stamps for indicating stamp duty, *viz.*, impressed stamps and adhesive stamps. The former includes impressed sheets, or sheets of paper bearing the impression of stamps of different values engraved thereon, and impressed labels.

"By Rule 4 all instruments chargeable with duty except *hundis* may be written on impressed sheets, and, except as provided by s. 10 of the said Act and by these rules shall be so written.'

"Rule 6 provides that *hundis* shall be written on impressed sheets bearing the word '*hundi*.'

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"The rules therefore lay down a distinction between impressed sheets bearing the word '*hundi*' and all other impressed sheets, and they seem to prescribe that *hundis* only should be written on sheets of the former description, and all other instruments on those of the latter description.

"This is further apparent from Rule 6A prescribed by Notification No. 2955, dated 1st December 1882 (*Gazette of India*, p. 487), which runs thus:—

'Promissory notes drawn or made in British India and chargeable with a duty of annas 6, 10 or 12 shall be written on impressed sheets of those values bearing the word '*hundi*.'

"This rule by implication directs that all promissory notes other than those mentioned in it should be written on impressed sheets not bearing the word '*hundi*', so that if a promissory note which is not chargeable with a duty of annas 6, 10 or 12 be written on an impressed sheet bearing the word '*hundi*', it cannot be held to be properly stamped in accordance with the rules framed by the Governor-General in Council. As the promissory note on which the claim in this case is based was chargeable with a duty of two annas only, it should not, according to those rules, have been written on an impressed sheet bearing the word '*hundi*,' and was not therefore duly stamped within the meaning of cl. (10), s. 3. In this view the contention of the learned counsel for the defendant seems to be correct.

"The learned pleader for the plaintiff has, however, drawn my attention to the fact that the invariable practice in this district, including that of the banks here, has been for promissory notes to be written on impressed sheets bearing the word '*hundi*,' and he argues that if the defendant's contention be allowed and the promissory note in suit and similar other promissory notes be held to be improperly stamped, the result will be that many dishonest debtors will be able to evade payment of just debts by taking advantage of their own neglect to execute properly stamped instruments. This circumstance cannot in my opinion be taken into consideration in the decision of the question now before me, but it certainly makes it

desirable that there should be an authoritative ruling on the point. The learned pleader has also filed copies of two unreported decisions of the Hon'ble High Court in which it was held that promissory notes payable on demand were properly stamped if written on impressed sheets bearing the word '*hun li.*' One of these cases was Small Cause Court reference No. 106 of 1885, dated 15th June 1885, upon a reference made by myself from Agra. The other case was 1st appeal No. 50 of 1885, decided on 16th November 1885. Those cases were not on all fours with the present suit, but the principle involved seems to have been the same, and the result of those rulings was that promissory notes written on '*hundi*' paper were properly stamped. The arguments for a contrary view were apparently not submitted to the Hon'ble Judges for their consideration.

"Having regard to the fact that these two rulings exist, and also to the fact noticed above that the practice hitherto has been for such instruments to be written on sheets bearing the word '*hundi,*' I deem it desirable to refer the case to the Hon'ble High Court for an authoritative decision on the following question :—

"Is a promissory note not chargeable with a duty of annas 6, 10 or 12, written on an impressed sheet bearing the word '*hundi,*' duly stamped within the meaning of the Stamp Act (I of 1879) and admissible in evidence?"

Mr. *A. H. S. Reid*, for the defendant, appeared in support of the objection that had been taken to the promissory note.

Pandit *Sundar Lal*, for the plaintiff.

EDGE, C.J.—This is a reference under s. 617 of the Code of Civil Procedure from the Officiating Small Cause Court Judge of Allahabad in which he asks :—"Is a promissory note not chargeable with a duty of annas 6, 10 or 12, written on an impressed sheet bearing the word '*hundi,*' 'duly stamped' within the meaning of the Stamp Act (I of 1879) and admissible in evidence?"

The question is larger than that which we need consider in this particular case. I propose to confine my answer to the question as

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applicable to the particular promissory note as to the admissibility of which the doubt arose. It was a promissory note payable otherwise than on demand, but not more than one year after the date. It was for an amount which did not exceed Rs. 200, and reading s. 5 of the Act in conjunction with clause 11 of the first schedule, it was a note which required a stamp of two annas only. The note in question was written upon stamped impressed paper of the value of two annas, but that paper bore the word "*hundi*," and the contention on behalf of the defendant in the suit is that inasmuch as the impressed paper bore upon it the word "*hundi*," it was impressed paper upon which a promissory note of this description could not lawfully be written so as to comply with the requirements of the Stamp Act and the rules framed by the Governor-General in Council under s. 9 of the Stamp Act, which rules have the force of law under s. 57 of that Act.

It is quite clear that a promissory note, in order to be duly stamped, must be written on impressed paper of an amount equivalent to the stamp required. It is also clear that *hundis* payable otherwise than on demand, but not more than one year after date or sight, and for amounts not exceeding Rs. 30,000 in individual value, must be written on impressed sheets bearing the word "*hundi*."

It has been contended that the effect of Notification No. 2955 of the 1st December 1882, amending the rules published under Notification No. 1288 of the 3rd March 1882, is to prohibit all promissory notes except those chargeable with a duty of annas 6, 10 or 12, being written on impressed paper bearing the word "*hundi*." I cannot so read the rules. The rule of the 1st December 1882, so far as it is material, is as follows :—

"(a). After Rule 6, the following Rule shall be inserted :—

"6(A). Promissory notes drawn or made in British India and chargeable with a duty of annas 6, 10 or 12, shall be written on impressed sheets of those values bearing the word '*hundi*.'

That may, or may not, have been an absolutely unnecessary rule. Whether it was so or not it is not necessary to enquire; but

a rule which says that certain promissory notes shall be written on paper bearing the word "*hundi*" cannot be interpreted as enacting that other promissory notes shall not be written on impressed paper of the proper value, if that paper happens to bear the word "*hundi*."

Under s. 9 of the Stamp Act the Governor-General in Council had power to regulate amongst other things (1) in the case of each kind of instrument the description of stamps which may be used, and (3) in the case of *hundis* the size of the paper on which they are written. Now, in this case the stamp impressed on the paper is of the full amount required for this particular promissory note, and the fact that that paper would be the paper required for a *hundi* requiring a two-anna stamp cannot alter the fact that the paper is of the full amount of stamp duty for the promissory note in question, or cause that promissory note to be considered as having been written on paper which was not duly stamped for that purpose. If the Governor-General in Council had enacted by rule that *hundis* should be written on blue paper, such an enactment alone could not be construed as prohibiting the writing of promissory notes on blue paper. Such a prohibition as is contended for in this case must be specifically enacted, if any such prohibition is intended. In my opinion the promissory note in question was written on duly stamped impressed paper of the requisite amount, and the promissory note, so far as it depends on the stamp, is admissible.

STRAIGHT, J.—By s. 5 of the Stamp Act it is declared that certain instruments shall be chargeable with duty the amount of which is to be found indicated in the first schedule to the Act. In that first schedule art. 11, a document of the kind to which this case has reference requires a two-anna stamp. By s. 9 of the Stamp Act it is declared that all duties with which instruments are chargeable shall be paid, and such payment shall be indicated, by means of stamps. This provision is to be given effect to, either in accordance with other provisions contained in the Act itself, or, where there is no such provision, in accordance with rules which may be made by the Governor-General in Council. These rules are to deal

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with, firstly, in the case of every instrument, the description of stamp to be used; secondly, where impressed stamps are to be used, the number of stamps to be used; and, thirdly, in the case of *hundis* the size of the paper on which instruments of that sort are to be written. No doubt that section earmarks these particulars as amongst "other matters," which such rules may regulate; but, in my opinion, these rules must be limited within and confined to the purposes of that particular section, namely, the duties with which the instruments are chargeable and the indication of payment on such instruments. By s. 57 of the Stamp Act, rules, if made by the Governor-General in Council, have the force of law, and it is common ground between the parties in this case that the question of this reference must be answered upon the rules of March 1882, as amended by the Notification of the 1st December 1882. By the rules of the 3rd March 1882, it is declared, in accordance with the powers conferred by s. 9 of the Stamp Act, that there shall be two kinds of stamps for indicating the payment of duty on instruments under the Indian Stamp Act of 1879; *viz*, *(a)* impressed stamps, which are divided into two classes, impressed sheets and impressed labels, and *(b)* adhesive stamps. It is admitted by the learned pleader for the plaintiff that the promissory note, upon which his client brought his suit, was required by s. 4 of the Governor-General's rules to be written on an impressed sheet, *i.e.*, upon a sheet of paper bearing the impression of a stamp of a particular value, and that it was so written is not denied on the part of the defendant. It is contended for the defendant, however, that because upon the particular piece of paper on which this promissory note is written the word '*hundi*' appears, therefore the paper is not an impressed sheet of the kind contemplated by Rule 4. Both the learned counsel for the defendant and the learned Small Cause Court Judge apparently based their arguments on the Notification of the 1st December 1882, *i.e.*, the argument is this, that because the Notification of the 1st December 1882, says:—"Promissory notes drawn or made in British India and chargeable with a duty of annas 6, 10 or 12, shall be written on impressed sheets of those values bearing the

word '*hundi*,' therefore no other promissory note requiring a less stamp can be written on such impressed paper, and if it is written on such impressed paper it is neither more nor less than an unstamped document. Now it is, I believe, a golden rule of all Judges who have to administer the laws relating to stamps and cognate matters that the provisions of such laws are to be construed strictly, and whenever there is any ambiguity or doubt, in favour of the subject. Consequently, following such rule and believing it to be a sound and a just rule, I shall not hold that this document is an unstamped document unless I find anything in the Governor-General's rules which places it beyond all doubt that this is so. In my opinion there is nothing in those rules which says this, and I hold that the paper upon which this promissory note is written is none the less an impressed paper bearing the impression of a two-anna stamp, because it happens to have the word '*hundi*' written on it, and I therefore entirely agree with the answer to the reference proposed by the learned Chief Justice.

MAHMOOD, J.—I also agree, and agree so entirely with what has fallen from the learned Chief Justice, and also with what has been stated by my brother Straight, that I have no desire to deliver a separate judgment other than showing the reason why I concur with them. The first point which I notice is one of the curious things which do occur occasionally in legislation, namely, the passage of a bill through the Legislature without a preamble. This is one of those exceptional enactments, and I can imagine that it was convenient not to have a preamble to such an enactment, just in the same way as a preamble was apparently thought unnecessary in passing the Court Fees Act (VII of 1870). The Legislature might not have been anxious to explain the reasons of these two enactments, but that reason can be nothing other than that they were taxing the Indian population, a statement which might not quite have suited the comfort of the Indian population had the enactment begun by saying something to this effect:—"Whereas it is expedient to impose further taxes upon the people of India, &c."

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I suspect this would be somewhat the imaginary preamble which would precede both these enactments, but the adage is right,—'sometimes silence is golden.'

Still the enacting part has to be attended to, and in doing so we look not only at the preliminary part, which is merely instructive, but also at the imperative mandate of the Legislature, and it says (s. 5) :—" Subject to the exemptions contained in the second schedule, the following instruments shall be chargeable with duty of the amount indicated in the first schedule as the proper duty therefor respectively," and then follows the specification of documents which includes this promissory note of the 4th January 1887, for the sum of Rs. 200, payable after not more than one year, and bearing interest at 12 per cent. per annum. It is clear that, notwithstanding the absence of a preamble to the statute it is nothing other than a penal statute as understood in the law for the purposes of interpretation. It is also penal by dint of s. 34, *viz.*, that " no instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person, or by any public officer unless such instrument is duly stamped :" and then follows a proviso in three clauses to which I do not wish to refer. These two sections, namely, ss. 5 and 34, leave to me no chance of doubting that this statute should be interpreted in the fashion described by my brother, Straight, and indeed in cases of doubt it is impossible to do otherwise than interpret Acts in favour of the subject, that is, not in favour of the State.

There are three other sections of the enactment to which I wish to refer. The first is s. 55, which enables the Governor-General in Council to make rules consistent with the statute " for regulating the supply and sale of stamps and stamped papers, the persons by whom alone such sale is to be conducted, and the duties and remuneration of such persons." The next section is s. 56, which gives to the Governor-General in Council power to " make rules consistent herewith to carry out generally the purposes of this Act,"

and then comes s. 57 of the enactment which gives to the rules so made the authority of an Act so soon as they are published in the *Gazette of India*.

In this case all these ceremonies or formalities required by these three sections have been gone through, and in the present case the argument of Mr. *Reid* rests mainly on the notification of the *Gazette of India* in relation to these matters. The learned Chief Justice and my learned brother, Straight, have already dealt with these rules so well and so completely in accordance with my own judgment that, beyond saying this, I wish to say nothing about them.

But because I have always entertained for Sir Michael Westropp, the learned Chief Justice of Bombay, as high a respect as a lawyer and as a Judge as I entertain for the present Chief Justice of this Court, I wish to read one passage from a judgment of Sir Michael Westropp in the case of *Dowlatram Harji* v. *Vitho Radhoji* (1). Sir Michael Westropp said :—

"The imposition of such excessive and minute details would be pitfalls to the unwary and would, by frequently invalidating documents, press harshly upon the illiterate classes, and overthrow thousands of honest transactions without producing any such advantageous result, in the form of revenue to the State, as would compensate it for the discontent which would be occasioned. The Legislature has avoided such stringent details, and it seems to us to have satisfied itself by legislating against defacement of the impressed stamp, and against such a mode of penning the document as would admit of that stamp being used for or applied to any other instrument."

I have read this passage especially because it might be regarded by some as *obiter dictum*, and certainly, from one point of view, I do not deny that it may be so regarded. No doubt Chief Justice Westropp in giving expression to these views felt it his duty to make it clear in his judgment that Judges when they are called upon to interpret, perhaps laxly-worded, statutes, must always remember the general rules of interpretation, which by dint of their

(1) I. L. R., 5 Bom., 188.

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being trained lawyers they are able to keep present to their minds, in spite of the lax use of phrases and conjunctions whether disjunctive or conjunctive, and of the disregard of the proper use of pronouns.

In the present case, if it had not been my good fortune to agree so entirely with what has fallen from the learned Chief Justice and my brother, Straight, I should, in view of the rules framed by the Government of India, have had to think not once, but twice, as to whether or nor they were "consistent" with the enactment within the meaning of ss. 55 and 56 of the Stamp Act (I of 1879).

I am saved from that necessity by the manner in which the case has been dealt with by the learned Chief Justice and my brother Straight, and I have only to say that I agree with their order.

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May 13.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr Justice Brodhurst.

SHIB SINGH (DEFENDANT) *v.* SITA RAM (PLAINTIFF).*

Execution of decree—Attachment of debt—Order prohibiting creditor from recovering debt—Suit for rent under attachment—Civil Procedure Code, s. 268 (*a*)—*Act XV of* 1877 *(Limitation Act), s.* 15—*Injunction or order staying a suit.*

S 268, clause (*a*) of the Civil Procedure Code, does not mean that, while a debt is under attachment, the person to whom the debt was originally owing, should be barred from bringing a suit in respect of it What it prohibits is the recovery of the debt, and the payment of it by the debtor to the creditor.

Semble.—An order of attachment under s. 268 of the Civil Procedure Code is not an injunction or order staying a suit within the meaning of s 15 of the Limitation Act (XV of 1877).

THE plaintiff in this case, Sita Ram, was zamindár and lambárdár of a village Leha Alampur, and the defendant Shib Singh was his tenant. The suit was for recovery of Rs. 2,027-11-4, arrears of rent, under s. 93 (*a*) of the North-Western Provinces Rent Act (XII of 1881), and was instituted in the Court of the Assistant

* Second Appeal No 892 of 1888 from a decree of H. F Evans, Esq., District Judge of Aligarh, dated the 6th March 1888, confirming a decree of Maulvi Muhammad Karim, Assistant Collector of Aligarh, dated the 30th March 1887.

Collector of Aligarh. It appeared that the rent for 1291 fasli, one of the years in respect of which rent was claimed, had been attached, by an order passed on the 2nd August 1886, in execution of a simple money decree held against the plaintiff by Kumar Daryao Singh. The order of attachment was passed under s. 268 (*a*) of the Civil Procedure Code. On behalf of the defendant it was contended that the effect of this order was to bar the present suit so far as it sought recovery of the rent for 1291 fasli.

The Court of first instance disallowed this plea, observing:—"Though the rent was attached in execution of a decree against the plaintiff, he has yet a right to sue. The attachment means that the money should not be paid to the plaintiff. The plaintiff is by all means competent to sue." The Court decreed the claim. On appeal by the defendant, the District Judge of Aligarh concurred in the view taken by the Assistant Collector. He said:—"The second ground of appeal is that, under the provisions of s. 268 of the Civil Procedure Code, the rents of 1291-92 fasli having been attached, the respondent could not sue for them. This is untenable. The creditor is not barred from suing for the debt, whatever effect s. 268 might have in preventing his taking out execution of the decree. The District Judge dismissed the appeal. The defendant presented a further appeal to the High Court."

Mr. *A. H. S. Reid*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

EDGE, C. J., and BRODHURST, J.—This was a suit for rent. The plaintiff, it appears, was lambardár, but whether he was suing as the agent of the co-sharers, or as the zamindár, and himself entitled to the rent sued for, does not appear. That question may have an important bearing in the execution department. The rent in question had been attached by one Kuar Daryao Singh, on the 2nd August 1886, for a debt by the present plaintiff to him. It is contended that by reason of s. 268 of the Code of Civil Procedure that attachment so long as it existed barred a suit by the plaintiff for the rent which was attached. That contention is mainly based on cl. (*a*) of s. 268 of the Code of Civil Procedure. If the Legis-

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lature had intended that, whilst a debt was under attachment, the person to whom the debt was originally owing should be barred from bringing a suit in respect of it, we would expect the Legislature to have used some such words as:—"During the existence of the attachment no suit shall be brought by the creditor against the debtor in respect of the debt attached." What s. 268 prohibits is the recovery of the debt and the payment of it by the debtor to the creditor. The debtor had an easy course provided for him under s. 268, as under that section he could have paid the money into Court and thus have avoided liability in this suit. That was not done here. Mr. *Chaudhri* contends, and we think with force, that if his client, the plaintiff, had not brought the suit when he did, a suit subsequently brought might be barred by limitation. On the other hand, Mr. *Reid* for the defendant-appellant says that the case would come within s. 15 of the Limitation Act. We do not think the case would be within s. 15 of the Limitation Act. We think it would be to read a good deal into s. 268 of the Code of Civil Procedure if we were to hold that an order of attachment under that section was equivalent to an injunction or an order staying a suit. The point seems to be a novel one, and, giving it our best attention, that is the opinion at which we have arrived. We express no opinion as to what may be the result of any proceedings in execution. We dismiss the appeal with costs.

Appeal dismissed.

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May 20.

Before Mr. Justice Mahmood.

SOHNA (OBJECTOR) *v.* KHALAK SINGH AND ANOTHER (PETITIONERS).

Jurisdiction—Exercise by Subordinate Judge of jurisdiction of District Court—Appeal—Bengal Civil Courts Act (XII of 1887), ss. 23, 24—Power of appellate Court to add respondent—Limitation—Civil Procedure Code, s. 559—Minor—Guardian—Bengal Minors Act (XL of 1858), s. 7.

The words in s. 24 of the Bengal Civil Courts Act (XII of 1887) "subject to the rules applicable to like proceedings when disposed of by the District Judge," include the rules relating to appeals. Therefore orders passed under that section by a Sub-

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* First appeal No. 167 of 1888 from an order of Maulvi Shah Ahmadullah Subordinate Judge of Cawnpore, dated the 18th August 1888.

ordinate Judge in proceedings under the Bengal Minors Act (XL of 1858) transferred to him under s. 23 (2) (*b*) of the former Act, are appealable to the High Court and not to the Court of the District Judge.

The power of an appellate Court to make a person a respondent, under s. 559 of the Civil Procedure Code, is not affected by the Limitation Act (XV of 1877).

In exercising its powers under s. 559 of the Civil Procedure Code, an appellate Court is competent to make a person a respondent who, in the original suit, was arrayed on the same side with the appellant.

The grant of a certificate under s. 7 of the Bengal Minors Act (XL of 1858) should not be based exclusively on considerations of propinquity of relationship without regard to the other circumstances of the case affecting the interests of the minor and the fitness of the person appointed.

The facts of this case are stated in the judgment of the Court.

Pandit *Moti Lal Nehru*, for the appellant.

Munshi *Madho Prasad*, for the respondents.

MAHMOOD, J.—This is a first appeal from order arising out of a litigation commenced under the Minors Act (XL of 1858) in respect of the guardianship of the person and property of a minor girl, Musammat Bakhtawari, daughter of one Sirdar Singh, deceased. The proceedings began with an application made by one Khalak Singh on the 8th September 1887, praying that he might be appointed guardian of the person and property of the minor. The application was opposed by one Bacheha Singh who claimed the certificate of guardianship in preference to the petitioner, Khalak Singh, and, his objection being allowed, the certificate was granted to him on the 7th January 1888, by the Subordinate Judge of Cawnpore, to whom the case appears to have been transferred under s. 23 of the Civil Courts Act (XII of 1887).

From the order of the Subordinate Judge an appeal was presented to this Court by Khalak Singh (case No. 19 of 1888) and it came on for hearing before me sitting here as a single Judge, and was disposed of by me on the 26th April 1888. For the reasons stated by me in my judgment of that day, I decreed the appeal, and, setting aside the Subordinate Judge's order of the 7th January, 1888, remanded the case to his Court for trial *de novo*. On that occasion I held *inter alia* that the Subordinate Judge had misapprehended

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the relative propinquity of the parties to the minor, and that in granting the certificate of guardianship to Bachcha Singh he had omitted to notice the salutary rule contained in s. 27 of the Act prohibiting "the appointment of any person other than a female as the guardian of the person of a female."

The case having thus been sent back to the Subordinate Judge's Court, two female objectors appeared on the scene desiring to take part in the litigation as objectors to Khalak Singh's application, and as claimants of the guardianship of the minor girl Musammat Bakhtawari. One of these objectors-claimants was Musammat Batasia, a sister of Khalak Singh, and the other was Musammat Sohna, both of whom appear to have been made parties to the litigation which (as Mr. *Moti Lal* on behalf of the appellant has put it) then stood arrayed representing the original petitioner Khalak Singh as the plaintiff, and the original objector Bachcha Singh as the opposite party along with Musammat Batasia and Musammat Sohna. The parties being thus arrayed the learned Subordinate Judge by his order of 18th August 1888, granted the certificate of guardianship to Musammat Batasia, and disallowed the claims of the petitioner Khalak Singh, and also of the objectors Bachcha Singh and Musammat Sohna.

It is from this order that this appeal was preferred only by Musammat Sohna on the 6th November 1888, and to the appeal she made only Khalak Singh a party respondent. But on the 9th February 1889, she applied to this Court that the name of Musammat Batasia might be added as a party respondent to the appeal, and notice having been issued, this Court directed that the name of Musammat Batasia be added as a party respondent to the cause subject to such objections as to limitation as she might be advised to take when the appeal came on for disposal. This order was made on the 15th March 1889.

The case having thus come on for hearing before me, Mr. *Madho Prasad*, who appears for Musammat Batasia, has raised three preliminary objections to the effect that, so far as Musammat Batasia is concerned, the appeal is not maintainable. The first of

these objections is that inasmuch as the case had been transferred to the Subordinate Judge and has been disposed of by him, this appeal from his decision could lie only under s. 28 of the Minors Act (XL of 1858), and that it therefore lay to the District Judge and not to this Court under the purview of that section. The second objection is that the judgment now under appeal being dated the 18th August 1888, and the appeal being preferred only against Khalak Singh on the 6th November 1888, the appellant's application of the 9th February 1889, praying for the addition of Musammat Batasia as a party respondent to the appeal was barred by limitation, and that the order of this Court dated the 15th March 1889, could not therefore be passed, and can be contested at this stage. The third objection is that inasmuch as in the lower Court, after the remand of the case, both Musammat Sohna the present appellant and Musammat Batasia were arrayed on the same side as objectors to the application of Khalak Singh, they cannot be arrayed opposite to each other in appeal.

All these points are contested by Mr. *Moti Lal*, on behalf of the appellant, and I wish to dispose of them before entering upon the merits of the case.

Upon the first point I am of opinion that the effect of the transfer of the case to the Subordinate Judge was to invest him with the same jurisdiction as that possessed by the District Judge in whose Court the application for certificate was originally filed. The terms of s. 28 of Act XL of 1858, like some other parts of that enactment, are not specifically clear, but the interpretation which I put upon them is that they do not in themselves intend to lay down any rules as to the tribunals which are to hear appeals under that section, but leave the matter to other provisions of the law regulating jurisdiction as to hearing of appeals. In the present case such provision is to be found in the Civil Courts Act, XII of 1887, and s. 24 of that enactment lays down, after referring to the previous section (which includes clause (*b*) relating to transfer of proceedings under Act XL of 1858) goes on to say that such proceedings shall be disposed of by the subordinate Court "*subject to the rules ap-*

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plicable to like proceedings when disposed of by the District Judge." I am of opinion that the words which I have just quoted and emphasized, include the rules relating to appeals, and since an appeal from a District Judge would lie to this Court, therefore an appeal from an order of the Subordinate Judge, when proceedings under Act XL of 1858 have been transferred to him, also lies to this Court, and not to the Court of the District Judge. I am fortified in this view by the significant circumstance that in the proviso to the first clause of s. 24 of the Civil Courts Act (XII of 1887) the Legislature has specially provided that appeals from the order of a Munsif when such proceedings are transferred to him, shall lie to the District Judge, subject again to an appeal to this Court under clause (2) of the same section. The Legislature could not therefore have intended that proceedings transferred to a Subordinate Judge should stand upon the same footing, for purposes of appeal, as those of a Munsif. Nor can I hold that if the appeal lay to the District Judge, the Legislature intended that the judgments or orders passed upon such appeal should be final and exempt from appeal to this Court. The present appeal was therefore rightly instituted here.

Upon the second point, which relates to the question of limitation, Mr. *Madho Prasad* relies upon the ruling of this Court in the case of *Ranjit Singh* v. *Sheo Prasad Ram* (1), where Stuart, C. J., and Spankie, J., in interpreting s. 32 (read with s. 582) of the Civil Procedure Code (Act X of 1877), whilst holding that the appellate Court was competent to add a respondent to the appeal, laid down the rule that such appellate Court was not competent to pass a decree against such added respondent if the appeal with reference to the date of the addition of such respondent was barred under s. 22 of the Limitation Act (XV of 1877). The learned pleader also relies upon the ruling of the Calcutta High Court in *The Corporation of the Town of Calcutta* v. *Anderson* (2) where it was held, *inter alia*, that the fact that the plaintiff's attorney on being served with notice of appeal failed to notice that a party who had been a defendant in the Court below had not been made a respondent in

(1) I. L. R. 2 All. 487. (2) I. L. R. 10 Calc. 445.

the appeal, coupled with the fact that the application made by the plaintiff to make such defendant a party respondent after the period of limitation had expired, was not made at the earliest opportunity possible, is not a sufficient ground under s. 5 of the Limitation Act for non-prosecution of the appeal within the period allowed. On the other hand, Mr. *Moti Lal* argues that the present case is not governed by s. 32 of the Civil Procedure Code, but by s. 559 which is independent of s. 32, and that the ruling of this Court in *Ranjit Singh* v. *Sheo Prasad Ram* (1) does not apply, because it does not deal with the provisions of s. 559. The learned pleader also argues that the provisions of s. 559 impose a duty or confer a power upon the Court, and any action under that section is therefore exempt from any limitation such as that contemplated by the Limitation Act (XV of 1877), and that therefore the order of this Court dated the 15th March 1889, adding Musammat Batasia as a party respondent to the appeal, though made after the lapse of the period of limitation, was not *ultra vires*, being an action which the Court could have taken *suo motu* irrespective of the appellant's application. Further, the learned pleader argues upon the authority of a ruling of my brethren Brodhurst and Tyrrell in *Jamna* v. *Ibrahim* (2) that even if the order of 15th March 1889, whereby Musammat Batasia was made a respondent to the appeal, be taken to be the date of the appeal against her, the provisions of s. 5 of the Limitation Act (XV of 1877) would entitle her to the benefit of the discretionary power, as here the circumstances of the case indicate that the name of Khalak Singh was by a mere clerical error and accident entered in the memorandum of appeal as respondent, instead of the name of Musammat Batasia in whose favour the lower Court had passed the order granting the certificate of guardianship complained of in this appeal.

I am of opinion that so far as the question of limitation in this case is concerned, it rests upon the solitary question whether the action of a Court of justice under s. 559 of the Civil Procedure Code, is subject to any such rule of limitation as would fall within the purview of the Limitation Act (XV of 1877). Now I entertain no

(1) I. L. R., 2 All. 487. (2) Weekly Notes, 1888, p. 58.

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doubt that the powers under s. 559 of the Code of Civil Procedure may be exercised by a Court *suo motu*, so long as that Court is seized of the case, and is empowered by the Civil Procedure Code to secure that the parties to the appeal are properly arrayed. That section occurs in the appellate Chapter XLI, and is independent of s. 32 of the Code.

In the case of *Dhan Singh* v. *Basant Singh* (1) in dealing with a cognate question (which related to the action of the Court under s. 206 of the Civil Procedure Code), I, referring to the ruling of this Court in *Gaya Prasad* v. *Sikri Prasad* (2), went on to say :—

"On a former occasion in the case of *Raghunath Das* v. *Raj Kumar* (3) I respectfully expressed my inability to accept that ruling, holding, as I did then, and still do, that under a proper interpretation of the preamble and s. 4 of the Limitation Act (XV of 1877) the rule of limitation is confined to the litigants and is inapplicable to acts which the Court may or has to perform *suo motu*. And I think that this view is supported by the principle upon which the rulings in *Roberts* v. *Harrison* (4), *Vithal Janardan* v. *Vithojirav Putlajirav* (5) and *Kylasa Goundan* v. *Ramasami Ayyan* (6) proceeded. S. 206 of the Civil Procedure Code empowers a Court of its own motion to amend its decree, and the mere fact that one of the parties has made an application asking the Court to exercise that power, will not, in my opinion, render the action of the Court subject to the rule of limitation."

To the rulings which I then cited I may now add the case of *Manickya Moyee* v. *Boroda Prosad Mookerjee* (7) where McDonell and Field, JJ. concurred in holding that the discretionary power of directing a person to be made a respondent conferred on the appellate Court by s. 559 of the Civil Procedure Code, is not limited by any provision of the Limitation Act, XV of 1877. The question of principle was however more fully discussed by Wilson, J. in *The Oriental Bank Corporation* v. *J. A. Charriol* (8) where that learned

(1) I. L. R. 8 All. 519.
(2) I. L. R. 4 All. 23.
(3) I. L. R. 7 All. 276.
(4) I. L. R. 7 Calc. 333.
(5) I. L. R. 6 Bom. 586.
(6) I. L. R. 4 Mad. 172.
(7) I. L. R. 9 Calc. 355.
(8) I. L. R. 12 Calc. 642.

Judge made an analysis drawing a distinction between those provisions of the Civil Procedure Code which enable parties to take action for purposes of the array of parties, and those provisions which enable a Court to secure that any particular cause is properly arrayed with reference to the parties concerned. I fully agree in all that was said by Wilson, J. in that case as to the distinction which led him to the conclusion that no question of limitation can arise with respect to the Court's power to make an order adding a party defendant to a suit. The learned Judge, after showing that such powers vested in the Court as distinguished from the action of the parties, went on to say :—

"For the exercise of these powers and those conferred by other sections upon Courts, no period of limitation is provided, and they are to be exercised in my opinion whenever the necessity for doing so is made apparent so long as the case is *sub judice*. Any other view would, I think, lead to disastrous consequences. It was suggested in the present case that though the Court might act at any time of its own motion, it could not act on the application of any person if the right of that person to claim relief was barred. I do not think that is so. I do not see how the fact of any person making an application, whether in time or out of time, can take away from the Court a power given to it to act at any time either upon or without application."

This view of the law was accepted by Garth, C. J., and I accept it also, though I cannot help feeling that the *ratio* so far as it relates to the matter of principle is opposed to the Division Bench rulings of this Court in *Ranjit Singh* v. *Sheo Prasad Ram* (1) *Gaya Prasad* v. *Sikri Prasad* (2) and *Jamna* v. *Ibrahim* (3). I hold therefore that the order passed by me on the 15th March 1889, directing that Musammat Batasia might be made a party respondent to this appeal, was not subject to any objection upon the ground of the rules of limitation, and therefore I disallow the preliminary objection upon this point.

(1) I. L. R., 9 All. 487. (2) I. L. R., 4 All. 23.
(3) Weekly Notes, 1888, p. 58.

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I now pass on to the third preliminary objection raised by Mr. *Madho Prasad* against the appeal. The learned pleader, relying upon a ruling of my brethren Straight and Tyrrell in *Atma Ram* v. *Balkishen* (1) argues that because in the cause as it stood arrayed in the Court below, both Musammat Sohna, appellant, and Musammat Batasia, were arrayed as opposite parties to the application of Khalak Singh, therefore as a matter of procedure Musammat Sohna, the appellant, and Musammat Batasia, the respondent, could not be arrayed on opposite sides in this appeal. So far as this point is concerned I may say that the ruling of my learned brethren is not in conformity with the conclusions arrived at by another Division Bench of this Court in a case which I have already cited, namely, *Ranjit Singh* v. *Sheo Prasad Ram* (2), where the power of the appellate Court to transpose the appeal on opposite sides was distinctly recognized, though that ruling took no notice of s. 559 of the Civil Pro- cedure Code.

Under this state of things I think I must arrive at my own conclusions upon the question of law. I have already said enough about the question of limitation to preclude my being understood to hold that either s. 5 or s. 22 of the Limitation Act has any application to a case such as this. The matter really rests solely and entirely upon the interpretation to be placed upon a specific provision of the statute law, namely, s. 559 of the Code of Civil Procedure. In interpreting that section as in interpreting others, where in the Civil Procedure Code general terms are employed, I have uniformly adhered to the view that the words of the statute when perfectly clear and devoid of qualifications, should not be subjected to any qualifications which the Legislature itself has not thought fit to express. In s. 559 of the Code there is no qualification rendering it illegal for an appellate Court to make any party to the "*suit*" a party to the appeal as respondent. If there is any restriction it consists of not being able to exercise the power of making a party to the "*suit*" an *appellant* as distinguished from a *respondent*. Analogical reason for such a restriction is to be found in the second

(1) I. L. R. 5 All 266. (2) I. L. R., 2 All. 487.

paragraph of s. 32 of the Code, which lays down that no person shall be added as a *plaintiff* without his consent.

The case here is not one of making a person a party *appellant*, but only one in which Musammat Batasia has been made party *respondent*, and I hold that s. 559 of the Civil Procedure Code gave ample power to justify an order whereby Musammat Batasia was made respondent to this appeal where her interests are opposed to those of the appellant.

The result of these views is that all the three preliminary objections raised in this appeal by Mr. *Madho Prasad* on behalf of the respondent Musammat Batasia fail, and I have now to consider the merits of the case.

Upon the merits of the case I am of opinion that the learned Judge of the lower Court has not fully gone into the facts and circumstances of the case, and has limited his adjudication as to the rights of Musammat Batasia, the respondent, before me, to the circumstance of her relative position with reference to the minor Musammat Bakhtawari. I do not say that the circumstance of propinquity of relationship is not a circumstance to be taken into account for the purpose of deciding disputes, any more than I would say that the rules of Hindu law which indicate the relative position of the parties with reference to the rights as to property should not be taken into account. But I think the learned Judge of the Court below has dealt with the matter entirely with reference to the pedigree which his judgment contains, and with reference entirely to the question of propinquity of relationship, and he has not dealt with any other matter as to fitness which requires consideration under s. 7 of Act XL of 1858.

It seems to me that although the enactment is far from being complete so as to indicate the policy of the Legislature in framing the enactment, it contains enough to indicate that the grant of certificate of guardianship, should not proceed upon mere questions of relationship, and that the Court is in each case required to consider the circumstances thereof, and to consult the interests of

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the minor in connection with the appointment of guardians, and issue of certificates under the enactment. It does not necessarily follow that the nearest relative is the best guardian to the minor, and mere propinquity of relationship would not therefore entitle the person *ipso facto* to be entitled to hold the certificate under the Act. This view I think is apparent from the whole enactment, but the case has not been regarded by the lower Court in this light at all. It misunderstood my judgment whereby the case was remanded on the former occasion by interpreting it to mean that I laid down the rule that mere propinquity of relationship was quite enough to satisfy the requirements of the statute.

In the present case there is a further difficulty than the one which I have already indicated, arising from the argument addressed to me by Mr. *Moti Lal* on behalf of the appellant. The difficulty is that the learned Judge of the lower Court has mixed up two duties which he had to perform under the statute, one being the appointment of the guardian of the person of the minor Musammat Bakhtawari under s. 11 of the Act, read with s. 27, and the other being the duty of appointing some one under s. 7 to manage the property of which she, the minor, was the owner. These two aspects of the case have not been clearly kept in view by the lower Court, and I think Mr. *Moti Lal* is entirely within his right when he contends that the appellant Musammat Sohna might possibly be a better guardian of both the person and property of the minor Bakhtawari.

I regret therefore that I find it necessary again to remand the case by setting aside the order of the lower Court, and to require that Court to deal with the questions raised with reference to the observations which I have made.

I decree the appeal, and setting aside the decree of the lower Court, remand the case under s. 562 of the Civil Procedure Code, read with s. 647 of the Code, and direct that costs will abide the result.

Cause remanded.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

1890. *June 4.*

ABDUL MAJID (DECREE-HOLDER) *v.* MUHAMMAD FAIZULLAH AND ANOTHER (JUDGMENT-DEBTORS) *

Execution of decree—Act XV of 1877 (*Limitation Act*), *sch. ii, art.* 179 (4)—"*Step in aid of execution*"—*Application by transferee of decree for sale of hypothecated property—Non registration of deed of assignment—Civil Procedure Code, s.* 232—*Act III of* 1877 (*Registration Act*), *ss.* 3, 17, 47, 49—*Effect of subsequent registration.*

On the 13th November 1886, the assignee of a decree for sale of hypothecated property applied, under s. 232 of the Civil Procedure Code, for execution of the decree, but, objection being raised, that the deed of assignment had not been registered, subsequently applied for the return of the deed that it might be registered, and it was returned accordingly. The deed was afterwards duly registered. The next application for execution of the decree was made on the 25th April 1888.

Held (i) that the deed of assignment was not a document which comprised immoveable property within the meaning of s. 49 of the Registration Act (III of 1877), a decree for sale not being immoveable property as defined in s. 3;

(ii) that consequently, although the assignee might not, under the latter portion of s. 49, use the deed for the purpose of proving his title, there was no provision in the Act saying that he should not take title under the deed;

(iii) that the position of the assignee when he made his application on the 13th November 1886 was that he was unable to prove that there was a title by assignment in himself;

(iv) that the subsequent registration cured the absence of registration on the 13th November 1886, and, under s. 47 of the Registration Act, the document thereupon had full effect, and related back to its execution;

(v) that the application of the 13th November 1886 was a step in aid of execution of the decree within the meaning of art. 179 (4) of sch. ii of the Limitation Act (XV of 1877), and that the application of the 25th April 1888, was within time.

THE facts of this case appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Munshi *Madho Prasad* and Babu *Rajendro Nath*, for the respondents.

EDGE, C.J., and BRODHURST, J.—This appeal arose out of proceedings in execution. The question here is, whether an application

* Second Appeal No. 1136 of 1889 from a decree of A. M. Markham, Esq. District Judge of Aligarh, dated 2nd August 1889, confirming a decree of Babu Sheo Sahai, Munsif of Kasganj, dated the 15th March 1889.

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which was made on the 25th April 1888, was made within time having regard to art. 179, sch. ii of the Limitation Act. That application was made by an assignee of a decree-holder, to whom the original decree-holder had assigned the decree and all benefits arising thereunder. That assignment was made on the 16th September 1886, and on 13th November 1886, the assignee, appellant here, applied under s. 232 of the Code of Civil Procedure to have his name substituted and for execution. Natices were issued, and on the 30th November 1886, the original decree-holder appeared and admitted that he had assigned the decree to Abdul Majid, the assignee. On the 10th January 1887, the judgment-debtor raised objections on the ground that the deed of assignment had not been registered, and on the 11th February 1887, Abdul Majid, the assignee, through his vakíl, applied to the Court for an adjournment of his application, that it might stand over for a fortnight, and that the deed of assignment which was on the file might be returned to him in order that it might be registered. On the same day the Munsif ordered the deed to be returned, and passed an order to the effect that the case may be struck off for the present. The deed of Abdul Majid was duly registered after it had been returned by the Munsif. Now, if the application of the 13th November 1886, was a step in aid of execution or can be treated as such, the present application of the 25th April 1888 has been made within time. Mr. *Rajendro Nath*, for the respondents, here judgment-debtors, has contended that Abdul Majid had no title on the 13th November 1886, as assignee, and that the application which was made on that day could not be treated as made by an assignee of the decree-holder, and, as it was not by the original decree-holder himself, he contends there was no step in aid of execution on the 13th November 1886, within the meaning of art. 179, sch. ii of the Limitation Act. He has cited several authorities. Those authorities are as follow, *Gopal Narayan* v. *Trimbak Sadashiv* (1), *Koob-Lal Chowdhry* v. *Nittyanánd Singh* (2), *Ulfatunnisa* v. *Hosain Khan* (3), *Raju Balu* v. *Krishnarav Ram Chandra* (4), *Mattongeney Dossee*

(1) I L R, 1 Bom. 267.
(2) I L. R, 9 Calc. 839.
I. L R, 9 Calc 520.
I. L. R., 2 Bom. 273

v. *Ram Narain Sadkhan* (1), *Martin* v. *Sheo Ram Lal* (2). It appears to us that those authorities are wide of the question we have got to decide here. Those authorities show that a document which must be registered under the Registration Act cannot, until it is registered, be given in evidence so as to affect immoveable property. Being carefully looked at, those authorities appear to decide no more. Now it appears to us that in order to support Mr. *Rajendro Nath's* contention, that is that the assignee on the 13th November 1886, had no title in fact as assignee, it would be necessary to hold that this deed of assignment was a document which comprised immoveable property. If it did comprise immoveable property, there is no doubt that being unregistered on the 13th November 1886, it came within the earlier part of s. 49 of the Registration Act which says "No document required by s. 17 to be registered shall affect immoveable property comprised therein." What was comprised in the document in question was an assignment of a decree which had been passed on an hypothecation bond, which decree could have been enforced by bringing an immoveable property which was comprised in the bond to sale. It would in our opinion be straining the language to hold that a decree for sale on a hypothecation bond was immoveable property; certainly it would not appear to be immoveable property as immoveable property is defined in s. 3 of the Registration Act. If this document was not a document which comprised immoveable property within the meaning of s. 49 of the Registration Act, we cannot see any provision in that Act which says that the assignee should not take title under it. It is quite another question whether he could use it for the purpose of proving his title. The distinction may appear a fine one, but we must remember that the Registration Act prescribes a penalty for non-registration and cuts down the free action of the parties; therefore we ought not to construe it so as to cut down the action of the parties further than the wording of the Act compels us to do. The provision in the latter portion of s. 49, namely, that a document such as this which requires to be registered under s. 17 shall not

(1) I L R., 4 Calc. 83. (2) I L R, 4 All 232.

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be received as evidence of a transaction affecting immoveable property, appears to us to apply. In effect the object which the Legislature had in view in passing the Act was to make registration a condition precedent in a case like this, not to the existence of the title in an assignee, but to the proof that such title existed. In our opinion the document having been subsequently duly registered, it had full effect and related back to its execution : that appears to be the effect of s. 47, and the mere fact that it was not registered on the 13th November 1886, was cured by the subsequent registration. As we regard the position of the parties it was this ; the assignee in fact of the decree when he made his application on the 13th November 1886, was unable to prove that there was a title by assignment in himself. It was a case of failure of evidence, and we consider that the application he made on the 11th February 1887, was a reasonable one, and was not an application in any sense to withdraw his application of the 13th November 1886. We think that the Munsif on the 11th February 1887, did not treat Abdul Majid's application of that date an application to withdraw. The fair meaning of his order was that the case might stand over for the present, and not that he dismissed the application. In the case of *Ganpat Pandurang* v. *Adarji Dadabhai* (1) an adjournment was allowed to a party to obtain registration of a deed under which that party claimed. In conclusion we are of opinion that the application of the 13th November 1886, was a step in aid of execution, and that the application of 25th April 1888 was within time. The decrees in the Court below will be set aside, and the case will be remanded to the first Court, which will reinstate the application of the 25th April 1888, and proceed to dispose of it according to law. The appellant here will have the costs here and hitherto below.

Cause remanded.

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(1) I. L. R., 3 Bom. 312.

PRIVY COUNCIL.

J. C.
P. C.
1890.
July 5th.

IN THE MATTER OF F. W. QUARRY.

[On appeal from the High Court for the North-Western Provinces]

Act XVIII of 1879, *Legal Practitioners Act, s* 13.

A pleader's professional misconduct having amounted to "reasonable cause," within the meaning of 13 of the Legal Practitioners Act, XVIII of 1879, for suspending him from practice, their Lordships declined to interfere with the decision of the High Court as to the punishment, it not being clearly shown that the quantum awarded was unreasonable and excessive.

APPEAL from an order (3rd December 1889) of the High Court.

The appellant, who in August 1871, had obtained a certificate under the Pleaders Act, XX of 1865, and had practised as a pleader at Mussoorie for some years, had been professionally concerned on behalf of the Delhi and London Bank, through their agent at that place, until the latter had ceased to employ him. After his employment by the Bank had ceased, a correspondence commenced between him and a suitor against whom the Bank had taken proceedings to recover a debt. It was alleged in the Court below that this correspondence showed unprofessional conduct on his part. The result was his suspension from practice for twelve months under s. 13 of the Legal Practitioners' Act, XVIII of 1879.

Mr. J. H. A. Branson, for the appellant, argued that the correspondence was open to a construction more favourable to him than that which the High Court had placed upon it. Even if that construction was correct, the sentence of suspension was in excess of what the circumstances required.

Their Lordships' judgment was delivered by LORD WATSON.

LORD WATSON.—The appellant, Mr. F. W. Quarry, was heard last Saturday on an application to stay the execution of an order of the High Court of the North-Western Provinces pending an appeal at his instance, and their Lordships on that occasion directed the petition to stand over, and allowed the appellant to be heard to-day on the merits of his appeal.

Present LORD WATSON, SIR B. PEACOCK and SIR R. COUCH.

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The letters produced appear to their Lordships to afford ample evidence, under the hand of the appellant, that, in his professional capacity, he was guilty of grave improprieties which the Court could not overlook when the matter was regularly brought under its notice. Such conduct, in the opinion of their Lordships, amounts to "reasonable cause" for suspending a certificated pleader within the meaning of s. 13 of the Act XVIII of 1879.

That being so, the only question which remains for consideration is, whether the learned Judges of the High Court have erred in visiting the offence with twelve months' suspension from office. It must be borne in mind that the Court which awarded that penalty were in a much better position than this Board to estimate the degree of punishment which, in the whole circumstances of the case, and in the interests of the profession and of the public, ought to follow such misconduct on the part of one of its pleaders. Their Lordships cannot, in a case like the present, interfere with the decision of the Court below unless it is clearly shown that the *quantum* of punishment was unreasonable and excessive. Notwithstanding the able and temperate argument of Mr. Branson, they are unable to come to that conclusion, and they will accordingly humbly advise Her Majesty that the appeal ought to be dismissed.

Solicitors for the appellant:—Messrs. *W. Carpenter and Son.*

Appeal dismissed.

CIVIL REFERENCE.

1890
July 10.

Before Sir John Edge, Kt., Chief Justice.

PIRBHU NARAIN SINGH (PLAINTIFF) *v.* SITA RAM AND OTHERS (DEFENDANTS) *

Court fee—Mortgage—Redemption—Decree for redemption conditional on payment of a certain sum—Appeal by mortgagor—Court-fee payable on memorandum of appeal—Act VII of 1870 *(Court Fees Act), s* 7, *ch ix*

Where a mortgagor sues for redemption on the allegation that the mortgage debt has been satisfied, and a decree for redemption is passed on payment of a certain

* Reference under s. 5 of the Court Fees Act.

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amount, and the mortgagor appeals against the amount he is ordered to pay, the court-fee payable on the memorandum of appeal must, under s. 7, cl. ix of Act VII of 1870, (Court Fees Act), be computed according to the principal money expressed to be secured by the instrument of mortgage, and not according to the balance which the mortgagor alleges to be due.

Semble If the decree had allowed redemption on payment of a certain sum, and the defendant mortgagee was appealing on the ground that the amount due was greater than that sum, the court-fee should be calculated on the difference between the sum mentioned in the decree and the amount alleged by the appellant to be due.

In this case the memorandum of appeal came before the Registrar of the Court on a question as to the sufficiency of stamp. The Registrar referred the question for decision, under s. 5 of the Court Fees Act, in these terms :—

"This is an appeal in a redemption of mortgage case by the plaintiff in the suit.

"The lower Court granted a decree for redemption on payment of Rs. 2,15,446-15-6, while the plaintiff claimed that the whole mortgage money had been paid.

"The appellant appeals against the amount he is ordered to pay for redemption, and the question of the right to redeem is not in contest.

"The question is, whether under these circumstances the memorandum of appeal should be stamped under s. 7, cl. IX of the Court Fees Act, according to the principal money expressed to be secured by the instrument of mortgage, or on the difference between the sum awarded and that which the appellant admits to be due.

"There are three rulings to the point. The first, in which this Court held that a suit might change its nature in appeal, was in nature very similar to this case, and it was held that the proper stamp was on the money value of the appeal.

Ram Lakhan Rai *v.* Bandan Rai (1).

"The next case was also decided by this Court. It was in a pre-emption case, but the principle laid down is clear and equally applicable to a redemption

Hafiz Ahmad *v.* Sobha Ram (2).

(1) Legal Remembrancer, vol. I, p. 162. (2) I. L R, 6 All, 488.

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PIRBHU NARAIN SINGH v. SITA RAM.

of mortgage case. It says that when the right to pre-empt is in question an appeal should be stamped on the value of the property as in the original suit; but when the question in appeal relates solely to the amount to be paid by the pre-emptor the fee should be calculated *ad valorem* on the amount actually in dispute.

"The last case deals with redemption cases.

"The case itself is hardly to the point, as the right to redeem was in issue, but the case quoted in note A seems to the point. It is not very clear whether the right to redeem was also in issue, but the last paragraph but one from the bottom of the page would point to its not being so. If this is so, the Bombay High Court held that in any appeal connected with redemption the stamp should be calculated as in the original suit on the principal amount secured by the mortgage deed.

Umar Khan v. Muhammad Khan (1).

"The principle laid down by this High Court in I. L. R., 6 All., 488, commends itself to me as the sounder for the following reasons:—

"(*a*) It recognises that the appeal may lie from only part of the decree, which the Bombay ruling does not seem to do, but which is clearly recognised by s. 16 of the Court Fees Act.

"(*b*) S. 7 of the Court Fees Act relates only to stamp valuation in suits, and is nowhere made applicable to appeals. In many instances the value in appeal may be definite, whereas in the original suit it could not be ascertained (were provision not made in the Act) until the suit were decided.

"The question involved is one of considerable importance, and the difference in fee in this case is large, and as there seems a difference of opinion between this High Court and that of Bombay, I refer the matter to the Judge appointed to decide such questions under s. 5 of the Court Fees Act.

"If the stamp be leviable on the amount secured by the instrument of mortgage, the memorandum seems to be properly stamped.

(1) I. L. R., 10 Bom. 41.

"If the stamp should be calculated on the sum contested by the appellant there is a deficiency of Rs. 1,825 (2,025—200). I would note that the period of limitation expires on the 17th instant."

On the above reference the Chief Justice made the following order :—

EDGE, C. J.—I am of opinion that the stamp is sufficient, and I so decide for the following reasons.

S. 7, sub-s. 9, of the Court Fees Act, VII of 1870, enacts that in suits such as this the amount of fee payable shall be computed according to the principal money expressed to be secured by the instrument of mortgage, and does not make the amount of the fee to depend on the balance which the mortgagor may say is due, or on that which the mortgagee alleges to be due. In the suit the mortgagor claimed a decree for redemption on the allegation that the mortgage debt had been satisfied. So far as the court-fee on the plaint was concerned, it was immaterial whether the mortgage debt had in fact been satisfied, or whether redemption could only be had on payment of Rs. 2,15,416-15-6.

This is the plaintiff-mortgagor's appeal, and it appears to me that the relief which he is claiming in this appeal is a decree for redemption of the mortgaged property on payment of the amount, if any, which is due. That appears to me to be a relief which it is impossible to value. In my opinion we must apply s. 7. sub-s. ix.

If, on the other hand, the decree below had decreed redemption on payment of, say, Rs. 500, and the defendants, mortgagees were appealing on the ground that the amount due was Rs. 2,00,000, I am of opinion that the amount of court-fee should be calculated on the difference between Rs. 500 and Rs. 2,00,000.

1890
October 31.

REVISIONAL CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr Justice Young.

JAWITRI (DEFENDANT) *v.* H A. EMILE (PLAINTIFF). *

Trespass—Building on plaintiff's land—Damages—Mandatory injunction—Suit for further damages—Alleged disobedience of mandatory injunction—Cause of action—Suit not maintainable.

The defendant having built a wall on the plaintiff's land, the plaintiff brought a suit in which he asked for damages for the trespass, and an injunction, and a decree was passed for damages and for a mandatory injunction directing the defendant within two months to remove the wall, and to restore the plaintiff's premises to their former condition Two years subsequently the plaintiff brought another suit for damages, alleging his cause of action to be the defendant's disobedience of the mandatory injunction, and proving as damages that people were deterred from becoming his tenants by fearing that, owing to the defendant's previous action, the hillside on which the plaintiff's premises were situate, was likely to fall There was no structural or other damage done to the plaintiff's property other than that which was done prior to the commencement of the previous suit.

Held that the suit would not lie for damages for non-compliance with the mandatory injunction, to compel the performance of which the plaintiff had his remedy in execution. *Mitchell* v. *Darley Main Colliery Company* (1) distinguished.

THE facts of this case are sufficiently stated in the judgment of the Court.

Babu *Dwarka Nath Banerji*, for the petitioner.

Mr. *J. E. Howard* and Babu *Bishan Sahai*, for the opposite party.

EDGE, C. J., and YOUNG, J.—The plaintiff in this case was the owner of Thespie Lodge, Mussooree. His property was on a lower level than that of the defendant. The defendant, in order to secure his property, which had been damaged by a slip, proceeded to build a "pushta" or retaining wall, and, unfortunately for him, commenced to build that wall on the plaintiff's premises, and thereby undoubtedly committed a trespass. It would appear that at the time of the slip some soil and other matters had come down the hillside on to the plaintiff's premises. The plaintiff brought a suit in which he asked

* Miscellaneous Application under s 622 of the Civil Procedure Code.

(1) L. R, 11 App Cas, 127.

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JAWATRI v. H. A. EMILE.

for damages for the wrongful trespass of the defendant, and also sought an injunction. The plaintiff got a decree for damages and obtained a mandatory injunction by which the defendant was ordered within two months to remove the wall from the plaintiff's premises and to restore the plaintiff's premises to the condition in which they were before. The plaintiff proceeded to execute that decree, but execution appears to have been resisted by the defendant; whether it was properly pressed on or not by the plaintiff we need not inquire. In 1889, two years subsequently, the plaintiff brought the present suit in which he sought damages, alleging his cause of action to be that the defendant had not obeyed the mandatory injunction. The damages which he proved were that people were deterred from becoming tenants of some rooms in his house, fearing that, owing to what the defendant had done, the hillside might come down and overwhelm them. The plaintiff obtained a decree for Rs. 300. There was in fact no structural or other damage done to the plaintiff's property other than that which was done before the commencement of the previous suit. The question for us is, whether this suit will lie. It has been contended by Mr. Howard on the authority of *Mitchell* v. *Darley Main Colliery Company* (1) that this suit lies. On the other hand, Mr. *Banerji* relies on the case of *Serrao* v. *Noel* (2) in the Court of Appeal. The *Darley Main Colliery Company* case was a case in which the defendants had lawfully excavated their own coal, but, unfortunately for them, had not taken the precaution to leave support for the surface. In that case a subsidence occurred and damaged the property of the plaintiff. Compensation was made for that damage, and many years subsequently a fresh subsidence occurred, and the majority of the House of Lords ultimately decided that the fresh subsidence gave a fresh cause of action. In *Backhouse* v. *Bonomi* (3) the House of Lords had decided that a cause of action did not arise until subsidence occurred. The House of Lords, following the principle of that case, held that each fresh subsidence gave a fresh cause of action. To take that case, if Mr. Mitchell, after compensation had been made for the

(1) L. R., 11 App. Cas. 127. (2) L. R., 15 Q. B. D., 549.
(3) 34 L. J. Q. B. 181.

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original damage, had brought a suit in which he claimed damages on the ground that people were deterred from taking his surface lands for building purposes owing to a fear that there might be fresh subsidence, we apprehend that such a suit would not have lain. In this case the cause of action was the wrongful act of the defendant in building the "pushta" on the land of the plaintiff. For that wrongful act compensation was awarded in the first suit, and a further remedy was decreed in the form of a mandatory injunction. All that has happened since has been that people have been afraid to take the rooms in the plaintiff's house fearing that some injury might happen to them. We need not decide whether the plaintiff would have any remedy or not, if, by reason of the original acts of the defendant, structural or other damages should happen to his property. In our opinion this suit does not lie for damages for non-compliance with the mandatory injunction to compel the performance of which the plaintiff had his remedy in execution. It is always dangerous to give illustrations, but it appears to us that it might equally well be contended that plaintiff who had obtained a money decree might bring a subsequent action for the non-payment of the decretal amount. We set aside the decree below and make an order dismissing the suit with costs here and below.

Appeal allowed.

APPELLATE CIVIL.

1890
December 5.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

RAMZAN (PETITIONER) *v.* GERARD (OBJECTOR).*

Surety, liability of—Judgment-debtor applying to be declared an insolvent—Civil Procedure Code, ss. 336, 344.

A person who executes a bond undertaking to produce a judgment-debtor at any time when the Court should direct him to do so, and standing security under s 336 of the Civil Procedure Code for the judgment-debtor's applying to be declared insolvent, is released from his obligation under the bond when the judgment-debtor

* Reference under s. 617 of the Civil Procedure Code, by C. Steel, Esq., Subordinate Judge, Dehra Dún, dated the 1st November 1889.

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files his petition under s. 344 to be declared insolvent. *Koylash Chandra Shaha v. Christophoridi* (1) approved.

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THIS was a reference to the High Court, under s. 617 of the Civil Procedure Code, by the Subordinate Judge of Dehra Dún. The order of reference was as follows :—

"Under the provisions of s. 617 of the Civil Procedure Code, I have the honour to forward a bond of F. B. Sakloth's under s. 336, together with the whole record, for orders.

"Briefly, Mr. Gerard was arrested in execution of a decree, and Mr. F. B. Sakloth gave the bond. Mr. Gerard did make his application under s. 344 of the Civil Procedure Code, but that application was rejected, as on the day fixed for the hearing he did not appear. A previous application had been rejected on the merits by the District Judge of Rawal Pindi. Subsequently to Mr. Gerard's application, F. B. Sakloth gave in a petition to the effect that "he understands his responsibility is now ended, but should it be otherwise, petitioner hereby revokes his suretyship so far as it involves further responsibility.' Therefore he was ordered to produce Mr. Gerard. This was on the 23rd September, and up to the 8th November, the date fixed for the hearing under s. 347 of the Civil Procedure Code, he did not do so.

"The question is, was F. B. Sakloth released from his bond when Mr. Gerard applied under s. 344 of the Civil Procedure Code?

"I am of opinion that he was not. The bond, though drawn up by Mr. Melvill, a vakíl of long standing, is not in the form prescribed on p. 326 of the Circular Book, and this escaped my notice at the time it was presented. However, it seems essentially the same in its provisions, which are, first, that 'I, Mr. Gerard shall apply' &c., and, second, that 'he shall appear when called on.' This last I take to mean until the decision of the insolvency case. Both conditions appear in s. 336 of the Civil Procedure Code. Mr. Melvill, however, has referred me to *Koylash Chandra Shaha* v. *Christophoridi* (1), which seems to be against me. The reasons for

(1) I. L. R., 15 Calc., 171.

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that decision, however, do not appear in the report of the case. Possibly it may have been based on the terms of the bond.

"I have the honour then to ask whether I am to follow that ruling, and, if I am, what procedure am I to adopt on a person's applying under s. 344 to secure his subsequent attendance till discharged or otherwise."

EDGE, C.J., and TYRRELL, J.—We are of opinion that the case of *Koylash Chandra Shaka* v. *Christophoridi* (1) was rightly decided and applied, and that the surety is discharged. The record will be returned.

1888
July 17.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

HAKIM-UN-NISSA (PLAINTIFF) *v* DEONARAIN AND OTHERS (DEFENDANTS).*

Act IV of 1882 (*Transfer of Property Act*), *s.* 135—*Actionable claim—Transfer of claim for an amount less than its value—Suit by transferee to enforce claim—Defendant not entitled to plead that terms of transfer were unconscionable.*

A mortgagee by conditional sale having obtained an order for foreclosure under Regulation XVII of 1806, his heirs, who were out of possession, executed a deed of assignment to a third person, transferring to him the rights acquired by the mortgagee under that order. At the time of the execution of the deed no steps had been taken by the mortgagee or his heirs to bring a suit for declaration of their title and for possession of the property. A suit for that purpose was brought by the assignee, the defendants being the conditional vendors and also the assignors under the deed above-mentioned. The latter made no defence, but admitted the justice of the claim, and a decree was passed in favour of the plaintiff against them as well as against the other defendants.

Held that the answering defendants, the conditional vendors, could not take advantage of the terms of the assignment for the purpose of defeating the claim, on the ground that the assignment was an unconscionable bargain, so unfair that the Court should not enforce it. If a person who has an actionable claim against another chooses to sell it cheap, that is no reason why that other is to stand cleared and discharged of his liability to the assignor.

Held also that the answering defendants were entitled to the benefit contained in the first paragraph of s. 135 of the Transfer of Property Act (IV of 1882), and would be entitled to take the bargain off the plaintiff's hands by paying to him the

* Second Appeal No 461 of 1887, from a decree of G J Nicholls, Esq., District Judge of Gházipur, dated the 22nd December 1886, reversing a decree of Pandit Ratan Lal, Subordinate Judge of Gházipur, dated the 29th September 1885.

(1) I. L. R., 15 Calc., 171.

price and incidental expenses of the sale with interest on that price from the day that the plaintiff paid it to the date of its repayment to him. *Jani Begam* v. *Jahangir Khan* (1) followed. *Grish Chandra* v. *Kashisauri Debi* (2) and *Khoshdeb Biswas* v. *Satar Mondol* (3) dissented from.

On the 18th October 1862, Manbasi Rai, Tehlu Rai and Ajaib Rai executed a deed of conditional sale of immoveable property to Behari Bhagat, for Rs. 400. In June 1873, Ram Ghulam and Bhusi, representatives of Behari Bhagat, instituted foreclosure proceedings under Regulation XVII of 1806, and an order for foreclosure was passed on the 16th June 1874. On the 30th July 1884, Ram Ghulam and Bhusi, being out of possession, and not having commenced any suit for declaration of their title and for possession by virtue of the order for foreclosure, executed a deed of assignment in favour of Musammat Hakim-un-nissa Bibi, by which they transferred to her all their rights as conditional vendees. The deed recited the inability of the assignors to find funds to prosecute a suit, and contained the following passage :—

"And if, after proper endeavour, the aforesaid rights above specified in this deed do not anyhow come into the purchaser's possession, or the principal with interest is not realized, the purchaser will be entitled to the refund of Rs. 200, *i.e.*, half the consideration mentioned in this bond, also of whatever cost the purchaser may have actually incurred in her attempt to obtain possession of the said rights and of whatever sum she may have paid to any party as costs, &c., or any other sum that the purchaser may have to pay in connection with this transaction will be recoverable from the person and property, moveable and immoveable, of the executant."

The present suit was brought by Musammat Hakim-un-nissa for proprietary possession of the property comprised in the conditional sale-deed of the 18th October 1862 and affected by the foreclosure order of the 16th June 1874. She impleaded as defendants to the suit the heirs of the original conditional vendors, and also her assignors under the deed of the 30th July 1884, Ram Ghulam and Bhusi.

(1) I. L. R., 9 All., 476. (2) I. L. R., 13 Calc., 145.
(3) I. L. R., 15 Calc., 436.

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These latter admitted the claim and did not defend the suit. The other defendants resisted the claim on the ground, *inter alia*, that the deed of the 30th July 1884, was a champertous transaction which the Courts ought not to enforce.

The Court of first instance (Subordinate Judge of Gházipur) decreed the claim. On appeal, the lower appellate Court (District Judge of Gházipur) reversed the first Court's judgment and dismissed the suit, on the ground that the terms of the deed of the 30th July 1884 were extortionate and inequitable, and contrary to public policy. This view was principally based on the smallness of the consideration for the deed. The District Judge observed—"If the litigation succeeded, the plaintiff got Rs. 2,498 odd, or the zamindári, while Ram Ghulam and Bhusi got nothing save perhaps the Rs. 200 shown to the Registrar: if it did not succeed, they were to pay her Rs. 200 and every cost, legitimate and illegitimate, the woman chose to demand. She could say what she liked as to costs and payments out of Court. I find that this suit is one contrary to public policy and therefore not maintainable."

The plaintiff appealed to the High Court.

Kunwar *Shivanath Sinha*, Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the appellant.

Mr. *Amir-ud-din* and Munshi *Kashi Prasad*, for the respondents.

STRAIGHT J.—The suit to which this appeal relates was one of some peculiarity. In order to make the question which has been raised in appeal and the view I take of it intelligible, it is necessary that I should state briefly the main facts out of which the litigation arises. It appears that in the year 1862 three persons by name Manbasi Rai, Tehlu Rai and Ajaib Rai were owners of a thirteen *gandas* share of *mauza* Malwari Kalan situate in the Gházipur district. On the 18th October 1862, those three persons, for a consideration of Rs. 400, made a conditional deed of sale, the term of which was to expire on the 31st October 1868, in favour of one Behari Bhagat, who is now dead and is represented by two persons named Ram

Ghulam and Bhusi. In the year 1873 certain proceedings for foreclosure under the old Regulation then in force were taken by Behari Bhagat under his conditional sale-deed, and upon the 16th June 1874 an order of foreclosure was made. Nothing appears to have been done upon that order by Behari Bhagat or by Ram Ghulam and Bhusi, his heirs. On the 30th July 1884, by a deed of assignment executed by Ram Ghulam and Bhusi in favour of Musammat Hakim-un-nissa, the plaintiff-appellant before us, those two persons transferred to Musammat Hakim-un-nissa the rights that they had acquired under the foreclosure order of the 16th June 1874. That right, the vendors not being in possession of or having obtained possession of the share originally conditionally sold to Behari Bhagat, consisted of a right to go into Court, if resisted by the conditional vendor, to have it declared that under the foreclosure order they had a good title to the property as proprietors, and to have possession of the same by ejectment of the vendor in possession. I have no doubt that, upon the face of that assignment of the 30th July 1884, what was sold by Ram Ghulam and Bhusi to Musammat Hakim-un-nissa was an actionable claim of the kind and description I have mentioned. Upon the strength of that assignment the plaintiff has come into Court with her present suit. It is unnecessary for me, for the purpose of dealing with this case up to the point it has reached in the Court below, to say any more than this, that among the defences raised on the part of the defendants was a defence that the agreement, as between the plaintiff and her vendors, was open to objection on the ground of its being champertous, and that accordingly it ought not to be recognised as giving the plaintiff a title upon which she can come into Court and sue. The Subordinate Judge, who tried the case as a Court of first instance, decreed the plaintiff's claim for proprietary possession of the property, holding, so I understand, that the foreclosure order of the 16th June 1874 was a good and binding order, and that upon the strength of it the plaintiff as the assignee of the conditional vendees had a good title, upon which she could prefer the claim put forward by her in the present suit. The defendants appealed to the learned Judge,

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and his judgment is entirely occupied with the discussion of the single question, as to whether the plea of champerty put forward by the defendants was a good plea and defeated the claim of the plaintiff-respondent before him. He has come to the conclusion, for the reasons stated in his judgment, that the transfer by the vendees of their right under the foreclosure order to the plaintiff was a champertous transaction, that the consideration given was wholly inadequate for the interest passed, and that the condition requiring the vendor to make good to the vendees all the money expended by her in the course of the litigation and otherwise, in the event of her failing to succeed in the suit to be brought by her, was a most onerous condition, which no Court ought to enforce.

It seems to me that the judgment of the learned Judge and his finding of fact has proceeded upon a misapprehension of the ruling of the Privy Council to which he refers. He has forgotten the circumstance that in this case there is no conflict as between the vendors to the plaintiff and the plaintiff in regard to the *bona fides* of the transaction or its fairness. The vendors were defendants to the suit in the Court below, but they made no defence. On the contrary, they admitted the justice of the plaintiff's claim; and, that being so, a decree was passed as against them, as well as against the other defendants. It must be taken as now finally determined that they have no right to assail their assignment to the plaintiff upon the ground that it was an unconscionable bargain, and so inequitable that the Court should not enforce it. That being so, it appears to me that the answering defendants-respondents before us and the appellants in the Court below cannot take advantage of the terms of this arrangement between the plaintiff and her vendors for the purpose of defeating the plaintiff's claim. Because, if a person who has an actionable claim against another chooses to sell it cheap, that is no reason that that other is to stand cleared and discharged altogether from the liability that he is under to the assignor. In the present case, assuming—it must be understood I am not deciding this question, because it was never entered into by the Court below—that the foreclosure order was a good one, and that the defendants are themselves or represent the original conditional vendor,

and that there are no legal obstacles in the shape of limitation or otherwise standing in the way, there is no reason that I can see why they should not be made to pay what, I will presently point out, the law requires them to pay, or surrender the property.

Now the learned Judge in his judgment apparently was not aware of the provisions which are contained in s. 135 of the Transfer of Property Act. No doubt in the two rulings of their Lordships of the Privy Council, one *Chedambara Chetty* v. *Renja Krishna Muthu Puchanja Naickar* (1) and the other *Ram Coomar Coondoo* v. *Chunder Canto Mookerjee* (2) their Lordships have justly remarked that there is no law of champerty or maintenance in force in India, at any rate in the *mufassil*. I have had myself occasion on more than one occasion to make the same observation. But in the case of *Jani Begam* v. *Jehangir Khan* (3) I took occasion very carefully to point out what appeared to me to be the departure, so far as India is concerned, that has been taken in that respect by the Transfer of Property Act. I regret that the view I expressed in that case was in difference with one that had found expression from the learned Judges of the Calcutta High Court in the case of *Grish Chandra* v. *Kashisauri Debi* (4), and I cannot help further regretting that I still find myself in conflict with another judgment of the same Court of the learned Chief Justice and Tottenham, J., in *Khoshdeb Biswas* v. *Satar Mandol* (5).

But I see no reason to alter the opinion I expressed in the ruling to which I have referred, and it seems to me that that ruling must be applied and ought to be applied to the present case. I do not think that the defendants are entitled to take advantage of the terms of the contract by which the rights under the foreclosure order of the 16th June 1874 were passed to the plaintiff. It is not found by the learned Judge nor is it suggested that there was no contract and no real sale: what is suggested is that there was a contract and a real sale, but for a most inadequate price. As I have said, I do not think that the defendants are entitled to take advantage of that

(1) L. R., 1 I. A., 241. (3) I L. R., 9 All, 476.
(2) L. R., 4 I. A., 23. (4) I L. R., 13 Calc., 145.
(5) I. L. R., 15 Calc., 436.

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circumstance, but I do think they are entitled to the benefit of the provision that is contained in the first paragraph of section 135 of the Transfer of Property Act. Hereafter when the appeal comes to be tried upon the merits and in reference to the evidence upon the record, and it has been found what was the true and real consideration for the assignment to the plaintiff of the rights under the foreclosure of the conditional sale-deed, the defendants will be entitled, subject to their not succeeding upon other pleas, to take the bargain off the hands of the plaintiff by paying to the plaintiff the price and incidental expenses of the sale with the interest on that price from the day that the plaintiff paid it to the date when it is repaid to her. That being the view I take of this case, it is clear that the judgment of the learned Judge cannot stand, and that it must be and it is set aside. This appeal being allowed, the case will be remanded to the lower appellate Court under section 562 of the Civil Procedure Code for restoration to the file of pending appeals and for disposal upon the merits. Costs will be costs in the cause.

BRODHURST, J.—I concur in allowing the appeal and remanding the case under section 562 of the Civil Procedure Code.

Cause remanded.

1888
August 13.

Before Mr. Justice Straight and Mr. Justice Brodhurst.

RAMPHUL TIWARI AND ANOTHER (DEFENDANTS) *v.* BADRI NATH (PLAINTIFF). *

Act IX of 1859, *s* 20—*Forfeiture of rebel's property—Limitation.*

A Hindu widow in possession of a six annas zamíndári share of her husband's, sold the share in 1855 to persons who, in 1858, were convicted of rebellion, and their estates, including the share, were confiscated by Government. The share was granted to other persons as a reward for loyalty, and remained in their possession until 1886, when a suit for possession and mesne profits was brought, just before the expiry of twelve years from the widow's death, by a reversioner to her husband's estate, on the ground that the sale of 1855 could not affect more than the widow's life interest, and that nothing more had been confiscated by the Government in 1858

* Second Appeal No. 338 of 1887, from a decree of R. J. Leeds, Esq., District Judge of Gorakhpur, dated the 6th December 1886, confirming a decree of Maulvi Shah Ahmad-ullah, Subordinate Judge of Gorakhpur, dated the 31st July 1886.

and granted to the defendants. The plaintiff had taken no steps in 1855 to question the sale, or in 1858 to assert his claims as reversioner.

Held that the suit was barred by s. 20 of Act IX of 1859. *Ram Dhun* v. *Rajah Bhowanee Singh* (1), *Bhugwan Dass* v *Banee Dalal* (2), and *Mahomed Bahadur Khan* v. *The Collector of Bareilly* (3), referred to.

THE facts of this case are fully stated in the judgment of Brodhurst, J.

Pandit *Ajudhia Nath* and Munshi *Kashi Prasad*, for the appellants.

Munshi *Juala Prasad*, for the respondent.

BRODHURST, J.—Lala Badri Nath, the plaintiff-respondent, sued the Secretary of State for India in Council and Ramphul and Kashi Prasad, Brahmins, to obtain proprietary possession of a six annas share in *mauza* Sukurdeha, pargana Dhuriapara, zila Gorakhpur, by avoidance of a sale-deed dated the 25th October 1855, by cancellation of mutation proceedings and of the grant made to the defendants and by dispossession of the defendants, and for the award of Rs. 277-8-0 as mesne profits, with interest.

The plaintiff in his plaint alleged that his brother, Munshi Ganesh Prasad, purchased the share above referred to at auction sale; that he died without issue; that after his death his widow, Musammat Gangan Kuari's name was entered in the Government records by right of inheritance, and that she remained in possession by right of life interest; that she sold the share in dispute to Sheogobind Chand and Lalbehari Chand, co-sharers in the village, on the 25th October 1855 without legal necessity, and that false allegations were inserted in the deed of sale; that in 1858 the purchasers of the share were convicted of rebellion; that all their estates, including six annas share in the suit, were consequently confiscated by the Government; that the six annas share was granted by the Government to the defendants as a *jágir*, and that they are now in possession of it; that Musammat Gangan Kuari had only a life interest in the six annas share; that she died on the 9th March

(1) N.-W. P., H. C. Rep., 1868, p. 139. (2) S. D. A., N.-W. P. 1864, vol ii, p. 220

(3) L. R., 1 I. A., 167.

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1874; that since her death the defendants have had no right to the share, and that their possession against the plaintiff is illegal.

The Secretary of State in Council pleaded limitation and prayed exemption. The other defendants, in their written statements, averred that the share in suit was confiscated by the Government in 1858, as admitted by the plaintiff, because its then proprietor had been convicted of rebellion; that it was granted to the defendants, who have ever since been in proprietary and adverse possession; that Musammat Gangan Kuari did not transfer merely her life interest in the share to Sheogobind Chand and Lalbehari Chand, but for legal necessity made an absolute sale to those persons of the share, with all its rights and interests; and that as the plaintiff did not sue to establish his claim within the period of one year from the date of attachment or seizure of the property in suit, his claim is barred by s. 20 of Act IX of 1859. The Subordinate Judge who tried the suit framed five issues and held that the plaintiff's rights and interests were not confiscated; that the plaintiff had no right to get possession of the share during the lifetime of Musammat Gangan Kuari; that s. 20 of Act IX of 1859 did not apply, and that the suit was not barred by special or general limitation; that Gangan Kuari died on the 9th March 1874, and that the suit which was instituted on the 6th March 1886, was within time from that date; that as the widow of Ganesh Prasad had only a life interest in the six annas share, it must be considered that her life tenure only was transferred under the deed of sale; that no cause of action had accrued to the plaintiff as against the Secretary of State in Council, and that the sum of Rs. 243 was due by the other defendants to the plaintiff as mesne profits.

The Subordinate Judge decreed the plaintiff's claim for possession of the share in suit and for Rs. 243 as mesne profits against the defendants, Ramphul and Kâshi Prasad, and, exempting the Secretary of State for India in Council, dismissed the rest of the claim. The defendants preferred an appeal against this decree, and the District Judge in his decision by which he disposed of the appeal observed:—"Two questions are raised by this appeal; *firs*

that of limitation under s. 20, Act IX of 1859: *second*, that of mesne profits. On the first point the appellant's contention appears to me obviously wrong. The order of confiscation is not on the record, but it cannot be assumed that Government intended to confiscate other than the absolute existing rights of the rebel, and the claim of reversioners or mortgagors, being in no wise affected by such confiscation, they are not required to come in within the period prescribed in the Act referred to. S. 20, in my opinion, applies only to persons who claimed present rights in the confiscated property. There are two rulings which, in my opinion, support this view; the one *Ram Dhun* v. *Rajah Bhowanee Singh* (1) and the other *Bhugwan Doss* v. *Banee Dalal* (2). On the second point very little has been said and there is in truth nothing to say. The plaintiff, having established his title, is clearly entitled to mesne profits, and no reason has been shown for refusing to accept the amount as determined by the lower Court. I dismiss the appeal with costs and the usual interest thereon."

Mr. *Kashi Prasad* for the defendants-appellants takes before us, in second appeal, the plea that the suit is barred by s. 20 of Act IX of 1859, and, in support of this plea, he cited the ruling of their Lordships of the Privy Council in *Mahomed Bahadur Khan* v. *The Collector of Bareilly* (3).

On the other hand, Mr. *Ram Prasad*, in supporting, on behalf of the plaintiffs-respondents, the judgments of the lower Courts, refers not only to the two rulings noticed by the lower appellate Court, but also to a ruling of the Privy Council in *Gouri Shunker* v. *The Mahárája of Bulrampore* (4).

Taking these three rulings in the order given above, I observe that the judgment reported in N.-W. P. H. C. Rep. 1868, p. 139, is by Morgan, C J. and Spankie, J., and is as follows :—

"The Principal Sadr Amín's decision cannot be supported. There is nothing in the records to show that the estate in suit was absolutely forfeited; on the contrary, it would appear that only

(1) N.-W. P. H. C. Rep., 1868, p. 139.
(2) S. D. A., N.-W. P., 1864, vol. ii, p. 220.
(3) L. R., 1 I. A., 167.
(4) I. L. R., 4 Calc, 839.

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the mortgagee's rights and interests were confiscated, and that only these rights were granted to the defendants; s. 20 of Act IX of 1859 does not apply to fix the plaintiffs' rights as mortgagors. These rights were not affected by the confiscation or the grant, which related only to the mortgagee's rights. We decide this upon the present record. But the record itself is in a very defective condition. Neither the confiscation proceedings nor the grant is among the papers. The case is remanded for trial. We inform the Principal Sadr Amín (if he finds that the confiscation and the grant was confined to the mortgagee's interest) that the limitation of one year is not applicable, and that the suit should be heard on the merits.

The judgment reported on page 220 of S. D. A., N.-W. P., Rep. for 1864 is by Roberts and Spankie, JJ. The headnote at the foot of the case referred to is as follows :—

"To constitute a bar under s. 20 of Act IX of 1859 there must be on the part of Government dispossession of the incumbent, or some open act inconsistent with the pretensions of the holder to put him upon taking measures to assert his claim."

The ruling of the Privy Council reported in *Gouri Shunker* v. *The Mahárája of Bulrámpore* (1) is under a law specially enacted for the province of Oudh, and therefore, as admitted by Mr. *Ram Prasad*, it is not directly applicable to this case. It is, I think, obvious that none of these three rulings is in point.

Next, as to the ruling relied upon by Mr. *Kashi Prasad*, and which is reported in L. R., 1 I. A., 167, the appeal in this case was from a judgment of a Bench of this Court, Morgan, C.J., and Roberts, J. That judgment and the judgment reported in N.-W. P. H. C. Rep., 1868, p. 139, and which is relied upon by the plaintiff-respondent, were both written by Sir Walter Morgan, and they are not in conflict.

The headnote of the Privy Council ruling which I have now to consider is as follows :—

(1) I. L. R., 4 Calc., 839.

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"*A* died, the ostensible owner of certain lands, leaving two sons under age. Upon *A's* death *B*, alleging that he was himself the real owner of the lands, caused himself to be recorded as owner in the Collector's books, and took possession. Some years later *B* was convicted and executed as a rebel, and all the property in his possession confiscated, including the land so taken by him.

"The sons of *A* sued for the recovery of the lands of which they had been dispossessed by *B*.

"The suit was brought more than a year after the younger plaintiff came of age and more than a year after the passing of Act IX of 1859, which allows (s. 20) only one year to sue and does not save the rights of persons under disability.

"*Held*, that the enactment applied to all Courts, and that the claim was barred by limitation."

From what is stated on page 171 it appears that the District Judge who tried the suit held that "both the plaintiffs had a right in equity; that the elder plaintiff was barred by law; that the younger plaintiff was not barred; and the Court decreed the claim of the younger plaintiff less the share of Bustee Begum, the mother, with costs in proportion."

On appeal to this Court, Morgan, C.J., and Roberts, J., in disposing of the appeal, observed—"In the view which we take of the case it is not necessary that we should consider whether or not the property claimed really belonged to the plaintiff's father and on his death descended to the plaintiff. It appears certain that at and previous to the time of the conviction of Khan Bahadur Khan it was in his possession and under his control, and that it was seized and confiscated as a portion of his possessions. If so, the plaintiff's right of suit to recover it is now barred by the operation of s. 20 of Act IX of 1859. By that section the rights of persons not charged with the offences therein referred to in respect of any property seized or forfeited are saved. But such saving is subject to the stringent proviso in the latter part of the section, whereby all rights of suit in respect of such property are taken away, unless the suit

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is instituted within one year from the seizure. The law being conceived in general terms, the Courts are not at liberty to introduce into it any exceptions, however just and reasonable they may appear and however consistent with the principles on which laws of limitation are ordinarily based. The law in question is a special law, and this provision was probably designed to promote the speedy assertion and adjudication of all rights put forward to forfeited property. The exceptions in favour of minority and other legal disability which the general law of limitation of suits (Act XIV of 1859) contains, have no place in this Act and cannot be introduced by the tribunals, which are bound to give full effect to the law. Upon this principle the plaintiffs, notwithstanding that they were minors at the time of the seizure, can claim no exemption from the operation of s. 20, and assuming the property sued for to have really belonged to them, yet as it was seized as a part of the confiscated property of Khan Bahadur Khan, they can now maintain no suit for its recovery, more than one year having elapsed from the time of seizure. The appeals Nos. 16, 21 and 25 are decreed and No. 9 is dismissed, but without costs."

The decision of their Lordships of the Privy Council was pronounced by Sir Montague Smith, and it contains the following passages :—

"The only question in this appeal, which comes before their Lordships in the shape of a special case, is whether the suit brought by the appellants against the Collector of Bareilly and the purchasers from the Government, to recover certain landed property in Bareilly, is barred by limitation.

"The Act of Limitation which is relied on by the Government is Act IX of 1859. That Act was passed for the special purpose of providing a Court for the adjudication of claims by innocent persons upon the property of rebels which had been forfeited to the Government. It established a special Court, consisting of three Commissioners, and suspended the action of all other Courts in respect of such claims. Special modes of proceeding are established and various clauses in the Act relate to that special course of procedure.

But these are provisions in the Act which relate not merely to the Court so established and the procedure under it, but are of a general character and apply to the property forfeited in whatever Court the claims may be made regarding it. Ss. 17 and 18 are also clauses of a general nature, and so it appears to their Lordships is s. 20 which contains the limitation on which the Government rely. The clause is this, 'nothing in this Act shall be held to affect the rights of parties not charged with any offence for which, upon conviction, the property of the offender is forfeited in respect to any property attached or seized as forfeited or liable to be forfeited to the Government; provided that no suit brought by any party in respect to such property shall be entertained unless it be instituted within the period of one year from the date of the attachment or seizure of the property to which the suit relates.'

"It was suggested that this limitation was meant to apply only to claims prosecuted before the Court of Commissioners established by the Act, and it was contended that the Act was of a temporary nature, and that its provisions fell with the purpose for which it was passed. But the Act is not made temporary by any enactment. It was in part repealed by the general repealing statute of 1868, that is, Act VIII of 1868, and the mode of repeal is significant. It is not altogether repealed, for the general clauses to which I have referred, including s. 20, are saved from the operation of the repealing Act. The repeal and saving are both found in the schedule to Act VIII. It is clear from their being thus saved that these clauses were at that time considered by the Legislature to be of a general nature affecting claims to property which had been forfeited, before whatever Court those claims might be prosecuted. The words are perfectly plain. No suit brought by any party in respect of forfeited property shall be entertained unless it be instituted within the period of a year from the date of seizure. It is true that this limitation is introduced by way of proviso. But their Lordships think that, looking at the various parts of the Act, and gathering the purpose and intention of the Legislature from the whole, this was a substantive enactment, and

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that although it appears under the form of a proviso, it was a limitation intended by the Legislature to apply to all suits brought by any person in respect of forfeited property.

"Assuming then that the case is within the Act, their Lordships will consider the other objections which have been raised. The answer first put forward was that this limitation could be held only to apply to some right, title and interest, using the words of the ordinary execution Acts of the rebel himself. Now it is obvious that this cannot be the right construction of the Act. It would be a wholly insensible enactment if it were, because the Act assumes that the interest of the rebel is forfeited and it is only in respect of claims other than his that this limitation could operate. The Act is declared not to affect the rights of the parties in respect of the property seized. The property is the thing seized as forfeited, whether it be land or a jewel, and the right referred to is the right of an innocent party, other than the right of a rebel in that property.

"Another contention, which seems to have been the only one urged in the High Court so far as it appears from the judgment, is that a saving with respect to parties under disabilities must be taken to be by equitable construction implied in this clause. Their Lordships, however, think it is impossible that any Court can add to the statute that which the Legislature has not done. The limitation is enacted in plain and absolute terms. The Legislature has not thought fit to extend the period which it has prescribed to persons under disability. Where such enlargements have been intended they are found in the Acts containing the limitation as in the general Act. This Act contains no such saving, and their Lordships would be legislating and not interpreting the statute if they were to introduce it.

"It was said that the clauses in the general statute, Act XIV of 1859, relating to disabilities might be imported into this Act, but this cannot properly be done. Act XIV is a code of limitation of general application. This Act is of a special kind, and does not admit of those enactments being annexed to it. It is to be ob-

served that, if it could be done, it would not assist the appellants because the limitation of Act IX is one year only, and the saving in favour of minors in s. 11 of Act XIV would not bring them within time, as a year elapsed after they came of age before the bringing of the present suit.

"One other objection requires to be noticed, that this Act was not retrospective. Undoubtedly Mr. *Doyne* was able to suggest cases in which hardship might arise to persons who would not have a full year to claim before they would be barred under the provisions of this Act, or even where the year might have elapsed between the date of the confiscation and passing of the Act. Although hard cases may arise, their Lordships consider that the Act is plainly retrospective in its operation, and includes claims to forfeited property which had been confiscated previously to its passing.

"Their Lordships are of opinion that the judgment of the High Court is right, and they must humbly advise Her Majesty to affirm it."

Reverting to the present case, I observe that Sheogobind Chand and Lalbehari Chand were zamíndárs of a ten annas share in mauza Sukurdeha and lambardárs of the whole village, and they took illegal possession of the remaining six annas share that had been purchased at public auction by Ganesh Prasad. His widow, Musammat Gangan Kuarj, alone sued them for possession, and in 1854 she obtained a decree. In 1855 she also dealt with the share as if she were the sole and absolute owner of it, for she sold it with all its rights and interests to Sheogobind Chand and Lalbehari Chand.

The plaintiff Badri Nath was separated in estate from his brother Ganesh Prasad, but he had a reversionary interest in the six annas share left by Ganesh Prasad, and when his brother's widow made an absolute sale of the share to Sheogobind Chand and Lalbehari Chand, he might have instituted against the vendor and vendees a suit, such as is now constantly brought in our Courts, to have the absolute sale declared to be void. He preferred no claim at all until 1886, and a suit of the description above referred

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to has been barred for the last twenty years or more. In 1858 the purchasers of the six annas share became rebels, and consequently their estates, including the entire sixteen annas share of mauza Sukurdeha, were confiscated by the Government, and that village and other villages were granted to the defendants-appellants in compensation of losses they had sustained at the hands of the rebels, other estates having been awarded to them in reward of their loyal services. These are facts that are admitted by the plaintiff-respondent.

Judging from the deed of sale of 1855, neither Ganesh Prasad nor his widow, Gangan Kuari, was ever in possession of the six annas share in Sukurdeha; but even if that was not the case Sheogobind Chand and Lalbehari Chand had the whole sixteen annas share of Sukurdeha in their possession and under their control from the 25th October 1855, the date of the sale, and the whole village was seized and confiscated by the Government as a part of their estates on their becoming rebels in 1858.

At the time the village was confiscated by the Government Musammat Gangan Kuari had for nearly three years past ceased to have any interest whatever in mauza Sukurdeha. If Badri Nath considered that he had a right to the six annas share he should, when he saw the whole village confiscated by the Government and granted to the defendants-appellants, have immediately preferred his claim to the share in Court, as any person of ordinary intelligence and prudence would have done. Had he thus acted, his claim would have been adjudicated upon, and possibly he might have obtained a decree which would, on his sister-in-law's death, have given him possession of the share. He, however, omitted to have recourse to a procedure that he obviously should have adopted, and his claim is now, in my opinion, undoubtedly barred by s. 20 of Act IX of 1859, as explained by their Lordships of the Privy Council.

Badri Nath is not entitled to any sympathy. In 1854 when litigation about the share was going on between his sister-in-law and Sheogobind Chand and Lalbehari Chand, in 1855 when his

sister-in-law sold the property with all its rights and interests to the same two persons, in 1858 when Sheogobind and Lalbehari who were in proprietary possession of the whole of Sukurdeha, including the share in suit, were convicted of rebellion and the village was confiscated by the Government and was granted to the defendants, on all these occasions Badri Nath stood by and took no action whatever to assert his claims. He did not sue for possession when his sister-in-law died in 1874, and he did not bring this suit until the 6th March 1886, that is, only two or three days before the expiration of a period of twelve years from the death of Gangan Kuari and of about twenty-eight years, thirty-one years and thirty-two years respectively from the confiscation and grant, from the sale and from the decree above referred to. Apparently for thirty years or more he had no intention of preferring a claim for the share, and probably he was induced by some speculation or other to institute a suit when the period of twelve years from his sister-in-law's death was just about to close.

I would allow the appeal, reverse the decrees of the lower Courts and dismiss the suit with all costs.

STRAIGHT, J.—I am of the same opinion.

Appeal allowed.

Before Mr Justice Straight and Mr. Justice Tyrrell.

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December 9.

HARGU LAL SINGH (DEFENDANT) *v.* MUHAMMAD RAZA KHAN AND ANOTHER (PLAINTIFFS).*

Execution of decree—Attachment—Incorrect description of property sought to be attached—Subsequent purchase of same property under a decree for pre-emption—Civil Procedure Code, s. 274.

In execution of a simple money decree against the holders of a *muáfi* interest in a certain village, who did not possess any zamíndári interest in that village, an attachment was obtained by the decree-holder in 1884 of "an eight biswas zamíndári share of mauza *D*," and under that attachment a sale took place in January 1886 Meanwhile, in December 1885, a decree for pre-emption in respect of a sale by the judgment-debtors in 1881 of their *muáfi* interests in the village, was decreed in favour of persons who were not parties to the litigation in which the attachment of 1884 was

* First Appeal No. 194 of 1888 from a decree of Maulvi Zain-ul-Abdin, Subordinate Judge of Moradabad, dated the 26th June 1888.

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effected. The plaintiffs (who were in possession) sued for a declaration of their right to the *muáfi* interests as against the auction-purchaser under the sale of January 1886.

Held that the attachment in 1884 was not a good attachment of the *muáfi* interests of the judgment-debtors, and the auction-purchaser could not be held to have purchased those *muáfi* interests, and the title of the plaintiffs under their pre-emptive decree of December 1885 must prevail.

THIS was a suit for a declaration of the plaintiffs' right to certain property under a decree for pre-emption passed on the 21st December 1885, as against the defendant, who had obtained "formal possession" only of the same property under a sale in execution of a simple money decree, the sale having taken place on the 20th January 1886. The plaintiffs were in actual possession. The material facts of the case are stated in the judgment of Straight, J.

Babu *Jogindro Nath Chaudhri*, for the appellant.

Mr. *Abdul Majid* and Maulvi *Zahur Husain*, for the respondents.

STRAIGHT, J.—I am of opinion that the Subordinate Judge has rightly decided this suit in favour of the plaintiffs. The question between them and the defendant is a very simple one, and appears from the following short facts which I may conveniently state.

On the 18th December 1880, one Imdad Husain obtained a money decree for a small sum against Bedar Shah. Bedar Shah was the father of Mahmud Shah, Firoz Shah, Timur Shah and Maksud Shah. Imdad Hussain sold his decree to two persons named Behari Lal and Makund Ram. On the 5th June 1881, Mahmud Shah and his two brothers executed a sale-deed of their *muáfi* interests in mauza Dhak Shahid, pargana Sambhal, in favour of one Mozaffar Ali for a sum of Rs. 6,500. The present plaintiffs, such sale having come to their knowledge, instituted a pre-emption suit, and upon the 21st December 1885, obtained a decree upon payment to the vendee-defendant of the sum of Rs. 5,580. Even if the title of the plaintiffs to the *muáfi* interests of Mahmud Shah and two of his brothers therefore cannot be thrown back to an earlier date, they became by their pre-emptive decree the proprietors of that interest from the 21st December 1885. On the 20th January

1886, Makund Ram and Behari Lal brought to sale the interests of Mahmud Shah and his two brothers in mauza Dhak Shahid, and the defendant purchased for a sum of Rs. 225. Upon the strength of that purchase he invoked the aid of the Civil Court executing that decree to give him possession, and formal possession was given him. In addition to that he obtained from the Revenue Court an order entering his name in lieu of Mahmud Shah and his two brothers in the revenue records. This is the cause of action for the institution of the present suit, and it is admitted that the plaintiffs are in actual possession and enjoyment under the title acquired by them upon the strength of their pre-emption decree. At first sight, upon the statement of the facts, it would appear to be conclusively clear that the plaintiffs have a title, dated not later, at any rate, than the 21st December 1885, to the whole of the property of Mahmud Shah and his two brothers. That title must have a superior claim over and above that of the defendant, which was not acquired until the 20th January 1886. But Mr. *Jogindro Nath*, on behalf of the defendant-appellant, has ingeniously and ably argued that as an attachment was put upon the interest of Mahmud Shah and his two brothers at the instance of Makund Ram and Behari Lal on the 11th May 1884, and as the execution sale of the 20th January 1886, took place under that attachment, his title, so far as resisting the title of the plaintiffs is concerned, relates back to the date of his attachment order, or at least that the attachment of the 11th May 1884, was a prohibition to the sale by the judgment-debtors of their interests to Mozaffar Ali upon the 5th June 1884.

The question in my judgment before us, and before the learned Subordinate Judge below, therefore, fines down to this, was a good attachment of the *muáfi* rights of Mahmud Shah and his two brothers put upon those rights on the 11th May 1884? I have asked Mr. *Jogindro Nath* to point out to me any other document beyond that numbered 21 and to be found at page 11 of the respondents' book, bearing upon the attachment. He was unable to do so, and indeed, with the exception of one other that we ourselves have discovered, and which is to found at page 14 of the same

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book, there is no other documentary evidence in this record to throw light upon the circumstances and the character of the attachment. There is, however, the oral evidence of a witness Bhola Nath, who was pleader for the decree-holders, who effected that attachment. He informs us to a certain extent as to what happened at the time it was made, and what he says does not help the defendant. Now taking the document at page 14, which bears date the 22nd April 1884, that appears to be an attachment issued in pursuance of s. 273 (s. 274 it ought to be) of the Civil Procedure Code, and the attached property is there described as the 8 biswas "*zamíndári*" share of mauza Dhak Shahid, bearing a *jama* of Rs. 60, the property of the defendants. Document No. 21, at page 11, is a list of the property of Mahmud Shah and others, judgment-debtors, to be attached in the case of execution of decree of Behari Lal and Makund Ram and others, plaintiffs, against Mahmud Shah and others, judgment-debtors, situate in mauza Dhak Shahid, pargana Shambhal, dated the 11th May 1884. This, although professing to be a list, is in reality a document showing that an 8 biswas "*zamíndári*" in mauza Dhak Shahid, bearing a revenue of Rs. 60 and belonging to the defendants, was attached, and that document is signed by the amín, who did effect the attachment, and by the Munsif of the Court who had ordered that attachment to take place. It is perfectly clear to my mind that in both these documents, *viz.*, the formal order under s. 274 of the Civil Procedure Code, and the report of what had been attached, what the decree-holder was attaching and had attached was an 8 biswa "*zamíndári*" share of his judgment-debtors in the particular mauza, which *zamíndári* share was stated as liable to a revenue of Rs. 60 a year.

Mr. *Jogindro Nath* for the appellant, very frankly and rightly has admitted that Mahmud Shah and his brothers had no *zamíndári* interests in Dhak Shahid at the time of this attachment, but that the interest they had was a *muáfidár's*, which would necessarily be of very considerably greater value than a mere *zamíndári* interest, such as that which was in fact attached.

Not only have we the contents of these two documents, but again reverting to the deposition of Bhola Nath, who was the pleader acting on behalf of the decree-holders, Makund Ram and Behari Lal, he said—

"It did not appear to me from the *khewat* whether the property was *zamíndári* or *muáfi*, and therefore I described it to be *zamíndári* property in the application. The *khewat* did not show that it was *zamíndári*. I had stated it to be *zamíndári* according to my judgment. With reference to the word *málguzári* mentioned in the 12th column of the copy of the *khewat*, I had considered it to be *zamíndári*. I don't remember whether the Collector inquired of the Munsif that that property did not stand in the names of the judgment-debtors, but in that of Mozaffar Ali Khan. I don't remember whether any objection was taken. This case was transferred to the Collector and the sale was made by him." To the plaintiffs' pleader :—"I got the property of the defendants attached considering it to be *zamíndári*. I considered that property to be *zamíndári*, and got the *zamíndári* attached."

There can be no question that what was intended to be attached was the *zamíndári* interest of the judgment-debtors, and what was attached was that *zamíndári* interest. For the purposes of disposing of this appeal I do not think it necessary to go further and to deal at length with what was in fact sold, though the proclamation of sale and the actual sale certificate, which is the document of title, leave no doubt in my mind that what was actually sold was the *zamíndári* interest of Mahmud Shah and his two brothers, and what the certificate of sale gave a title to was a *zamíndári* interest.

The contention for the appellant comes to this, that where an attachment has been made of a judgment-debtor's *zamíndári* interest and a sale has taken place in pursuance of that attachment and a certificate of sale granted for the *zamíndári* interest, though the judgment-debtors possess no *zamíndári* interest but a *muáfi* interest, yet the auction purchaser must be taken to have purchased a *muáfi* interest. It would be a very strong thing to hold any such

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view. It must be remembered that we are dealing with parties as plaintiffs, who had no share in the litigation under which the attachment was put upon the interests of the judgment-debtors in that matter. They are third parties wholly outside that litigation, who obtained a clean title upon the 1st December 1885, unless the attachment of 11th May 1884, can be maintained. I think that they are entitled to put the defendant upon strict proof that the attachment under which the sale to him took place was a good attachment in law, and that there was no such misdescription in it of the interests of the judgment-debtors as would mislead either purchasers at the auction to bid or persons interested in the property to refrain from coming forward and making any claim. For these reasons I think that the Subordinate Judge was right. I dismiss the appeal with costs.

TYRRELL, J.—I concur.

Appeal dismissed.

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December 18.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

KALLU RAI AND OTHERS (JUDGMENT-DEBTORS) *v.* FAHIMAN AND OTHERS (DECREE-HOLDERS).*

Civil Procedure Code, s. 206—Application to bring decree into conformity with the judgment—Execution of decree—Limitation—Act XV of 1877, *sch. ii, art* 179 (4)—"*Step in aid of execution.*"

The granting of an application under s. 206 of the Civil Procedure Code to bring a decree into conformity with the judgment does not form the starting point of a fresh period of limitation in favour of the decree-holder; nor is such an application a "step in aid of execution" within the meaning of art 179, schedule ii, of the Limitation Act (XV of 1877).

Kishen Sahai v. *The Collector of Allahabad* (1) distinguished.

THE facts of this case are sufficiently stated in the judgment of Straight, J.

Munshi Madho Prasad, for the appellants.

Mr. *Abdul Raoof* and Mr. *Abdul Majid*, for the respondents.

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* First Appeal No. 38 of 1889 from an order of Babu Lalta Prasad, Subordinate Judge of Ghazipur, dated the 26th November 1888.

(1) I. L. R., 4 All., 137.

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STRAIGHT, J.—This appeal must prevail. On the 29th September 1883, a money decree was passed by the Court of the Subordinate Judge of Ghâzipur in favour of the decree-holders, respondents. On the 28th June 1884, in consequence of there being some arithmetical defect in the decree, an application was made by the decree-holders to the Court which passed it under s. 206 of the Code of Civil Procedure for amendment of the decree. It is to be observed that an application under s. 206 contemplates that the judgment is correct, but the decree is not in conformity with, but is at variance with, the judgment. In the present case the decree was amended in the way prayed for by the Subordinate Judge on the 25th November 1885. The first application for the execution of the decree was made on the 5th November 1886. It was contended before the Subordinate Judge below, and it is contended here, that the execution of the decree of the 29th September 1883, was barred by limitation, because the first application for execution of the 5th November 1886, was made more than three years after the date of the decree. It was answered by the decree-holder that he is entitled to treat the order amending the decree of 25th November 1885, as giving him a new period of limitation and a fresh starting point; and that this view has been adopted by the learned Subordinate Judge upon the authority of *Kishen Sahai* v. *The Collector of Allahabad* (1). The judgment-debtor appeals to this Court, and his contention is, first, that the case is inapplicable, but that, if it is applicable, it is unsound, and the decree-holder is not entitled to calculate the period of execution of decree from the 25th November 1885. With regard to the case of *Kishen Sahai* v. *The Collector of Allahabad* (1) I have looked into the facts as set out in the report and I find that the passage where Mr. Justice Oldfield in delivering the judgment remarks "the proceedings under this application were substantially of the nature of a review of judgment" probably had reference to the peculiar circumstances of a very peculiar case, in which the proceedings ostensibly under s. 206 of the Code of Civil Procedure were of such a character as that they could only properly have been dealt with by review of judgment. I therefore do not

(1) I. L. R., 4 All, 137.

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think that the authority of *Kishen Sahai* v. *The Collector of Allahabad* (1) stands at all in my way in allowing this appeal. The application for amendment, which was made by the decree-holders in the case on the 28th June 1884, was an application for amendment of decree pure and simple, and all that was asked for was to make a correction in it in a statement of certain figures, so as to make it a decree corresponding with the directions as to costs given in the judgment. It was suggested that we should regard the proceedings under s. 206 as amounting to a step in aid of execution, namely, under para. IV of art. 179, sch. II of the Limitation Act. I cannot take this view. The Court which has to deal with applications under s. 206 of the Code of Civil Procedure is the Court which passed the decree, and not the Court which is executing the decree. Furthermore it may be said in this case, that no application for execution of the decree has ever been made, and therefore no foundation has been laid for an application to take some step in aid of execution, that is to say, in furtherance of the execution of decree. I think that the application of the 5th November 1886, was barred by limitation, and for these reasons I allow the appeal, reverse the decree of the lower Court and hold that the decree of the 29th September 1883, was time-barred and cannot be executed.

TYRRELL, J.—I entirely agree.

Appeal allowed.

1890
May 7.

Before Mr. Justice Straight and Mr. Justice Mahmood.

BINDA (PLAINTIFF) *v.* KAUNSILIA AND ANOTHER (DEFENDANTS)*

Hindu Law—Suit for restitution of conjugal rights—Desertion—Cruelty—Limitation—Act XV of 1877 *(Limitation Act) s.* 23, *sch. ii., Nos.* 34, 35, *and* 120.

The texts of the Hindu law relating to conjugal cohabitation and imposing restrictions upon the liberty of the wife, and placing her under the control of her husband, are not merely moral precepts, but rules of law. The rights and duties which they create may be enforced by either party against the other and not exclu-

* Second appeal No. 1194 of 1887, from a decree of Babu Promoda Charn Banerji, Judge of the Court of Small Causes (exercising the powers of a Subordinate Judge) of Allahabad, dated the 3rd May 1887, reversing a decree of Babu Ganga Prasad, Munsif of Allahabad, dated the 25th February 1889.

(1) I. L. R., 4 All., 137.

sively by the husband against the wife. The Civil Courts of British India, as occupying the position in respect of judicial functions formerly occupied in the system of Hindu Law by the king, have undoubtedly jurisdiction in respect of the enforcement of such rights and duties. The Civil Courts of British India can therefore properly entertain a suit between Hindus for the restitution of conjugal rights, or for the recovery of a wife who has deserted her husband.

It is not necessary, as a condition precedent to such suits, the parties being Hindus, that there should be any demand by the plaintiff and refusal by the defendant. The provisions of arts 34 and 35 of the second schedule of the Limitation Act cannot be taken as applicable to suits of this description. To hold that they did apply would be to introduce serious innovations into the personal law of the Hindus (and of the Muhammadans) which could not have been contemplated by a statute of the nature and scope of the Limitation Act. The limitation applicable to suits of the present nature is that of art. 120 of the second schedule, read with s. 23 of the Limitation Act.

Desertion by a wife of her husband is permitted by the Hindu Law under certain circumstances, but the insanity of the husband will not justify his desertion by the wife. In any case desertion does not terminate the relation of husband and wife. A suit for restitution of conjugal rights could in such case only be effectually met by establishing a plea of some matrimonial offence on the part of the complainant such as would entitle the defendant to a separation. Legal cruelty on the part of the complainant may be a ground for refusing restitution of conjugal rights, or for imposing terms on the complainant.

THE facts of this case were as follows :—

The plaintiff, Binda, instituted a suit against his wife, Musammat Kaunsilia, and one Bechu, who was alleged to be harbouring her, for restitution of conjugal rights and for recovery of his wife, on the 16th November 1886. The Court of first instance decreed the plaintiff's claim. The lower appellate Court reversed the decree of the first Court and dismissed the suit as barred by limitation. The plaintiff then appealed to the High Court and the case came before Mahmood, J., who, by his order of the 17th July 1888, referred it to a Bench consisting of Straight, J., and himself. On the 31st July 1889, the Bench so constituted remanded the case under s. 566 of the Code of Civil Procedure to the lower appellate Court for determination of the following issue :—"Whether on the 24th October 1886, or about that time, as asserted in paragraph 4 of the plaint, there was a demand made by the plaintiff to his wife, the defendant, Musammat Kaunsilia, to return to him and a refusal by

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her to do so?" On this issue the lower appellate Court recorded certain findings on the 16th September 1889, which findings are fully set forth in the judgment of Mahmood, J. The case then came on for hearing before Straight and Mahmood, JJ.

Pandit *Sundar Lal*, for the appellant.

Mr. *J. Simeon*, for the respondent.

MAHMOOD, J.—The preliminary facts of this case and the points of law to which they give rise were set forth by me in my order of the 17th July 1888, whereby the case was referred to a Bench of two Judges consisting of my brother Straight and myself, and upon the case coming on for hearing before us, we, by our order of the 31st July 1889, remanded the case under s. 566 of the Code of Civil Procedure to the lower appellate Court for a clear finding on the issue, whether on the 24th October 1886, or about that time (as asserted in paragraph 4 of the plaint) there was a demand made by the plaintiff to his wife, the defendant, Musammat Kaunsilia, to return to him, and a refusal by her to do so.

Under this issue the learned Judge of the lower appellate Court has found that the elopement of the plaintiff's wife and his demand for her return and her refusal took place more than five years before suit, that Musammat Kaunsilia, the defendant, had ever since been cohabiting with Bechu, defendant, and by him has given birth to two children, one of whom is still alive, and that neither demand by the husband nor refusal by the wife of conjugal rights was proved to have been made within two years before the suit.

To these findings no objections have been taken by either party under s. 567 of the Civil Procedure Code, but the learned pleader for the respondent argues that these findings are fatal to the suit. He contends :—

First, that a remedy by suit for restitution of conjugal rights by enforcing return and cohabitation is not contemplated by the Hindu Law, and therefore a suit of this character is not entertainable by the Civil Court.

Secondly, that even if such a suit is maintainable, a definite demand and refusal of restitution of conjugal rights is a condition precedent to the maintainability of such an action.

Thirdly, that after such demand has been made the lapse of two years will bar the action for ever under clauses 34 and 35 of sch. ii of the Limitation Act (XV of 1877).

Fourthly, that under the circumstances of this case the defendant, Musammat Kaunsilia, must be treated as a deserted wife and no longer amenable to the husband's demand for restitution of conjugal rights under the Hindu Law, and

Fifthly, that in any case the granting of a decree for restitution of conjugal rights is entirely within the discretionary power of the Court, which, under the circumstances of this case, should not be exercised.

The argument for the appellant contests all these points and aims at showing that the suit is maintainable, that it is not barred by limitation, and should be decreed under the Hindu Law.

It will be convenient to consider the case in the order of the points urged on behalf of the respondent.

Upon the first point I am of opinion that there is ample authority in the Hindu Law to show that it is the duty of a wife to live with her husband in conjugal cohabitation, discharging such functions as the domestic law of the Hindus assigns to her. These authorities are collected in Colebrooke's Digest of Hindu Law, Volume II, Book IV, Chapter I and Chapter II, and, when read together, furnish a very interesting and instructive picture of the domestic conjugal life of the husband and wife as contemplated by the Hindu Law.

Some of these texts may be quoted here. Perhaps the most important is one of Manu, with which Chapter II of Colebrooke's Digest (Vol. II, page 137) opens, on the duties of a wife :—

"In childhood must a female be dependent on her father; in youth, on her husband; her lord being dead, on her sons;.....a

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woman must never seek independence. Never let her wish to separate herself from her father, her husband, or her sons; for, by a separation from them she exposes both families to contempt. She must always live with a cheerful temper, with good management in the affairs of the house, with great care of the household furniture and with a frugal hand in all her expenses. Him to whom her father has given her, or her brother, with the paternal assent, let her obsequiously honour, while he lives; and when he dies, let her never neglect him. The recitation of holy texts and the sacrifice ordained by the Lord of creatures are used in marriages for the sake of procuring good fortune to brides; but the first gift or *troth plighted* by the husband is the primary cause and origin of *marital dominion*. When the husband has performed the nuptial rights with texts from the *Veda* he gives bliss continually to his wife here below, both in season and out of season; and he will give her happiness in the next world. Though inobservant of approved usages, or enamoured of another woman, or devoid of good qualities, yet a husband must constantly be revered as a *God* by a virtuous wife." (Manu Ch. V, vv. 148-54). "Day and night must women be held by their protectors in a state of dependence; but in lawful and innocent recreations, though rather addicted to them, they may be left at their own disposal. Their fathers protect them in childhood; their husbands protect them in youth; their sons protect them in age; a woman is never fit for independence" (Manu Ch. IX, vv. 2 and 3). "Woman must, above all, be restrained from the smallest illicit gratification; for, not being thus restrained, they bring sorrow on both families. Let husbands consider this as supreme law ordained for all classes; and let them, how weak soever, diligently keep their wives under lawful restrictions. (Manu Ch. IX, vv. 5 and 6). Let the husband keep his wife employed in the collection and expenditure of wealth, in purification and female duty, in the preparation of daily food and the superintendence of household utensils." (Manu Ch. IX, v. 11). The production of children, the nurture of them when produced, and the daily superintendence of domestic affairs are peculiar to the wife. From the wife alone proceed offspring, good household management, solicitous attention, most

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exquisite caresses and that heavenly beatitude which she obtains for the manes of ancestors and for the *husband* himself. She who deserts not her lord but keeps in subjection to him her heart, her speech and her body, shall attain his mansion in heaven, and, by the virtuous in this world be called *Sadhwi* or *good and faithful*. But a wife by disloyalty to her husband shall incur disgrace in this life, and be born *in the next* from the womb of a *Shakal*, or be tormented with horrible diseases which punish vice." (Manu Ch. IX, vv. 27—30).

These texts from Manu are supported by many other sacred texts of the Hindu Law justifying what Dr. Gurudas Banerji has said :—

"No system of law has ever surpassed our own in enjoining on the wife the duty of obedience to the husband and veneration for his person." (Tagore Law Lectures, 1878, p. 120).

"It follows from the very nature of the matrimonial relations that the husband and the wife must each be entitled to the society of the other. It is one of the express conditions in the nuptial vow of the Hindus that each party is to become the associate of the other." (ib., p. 114). This is well fortified by original authorities, and the text of *Harita*, in propounding the conduct enjoined to married women, begins by saying :—

"The wife is the home : a man should not consider his home a habitation ungraced by a wife ; therefore is she another home." The text which Colebrooke has fully quoted (Vol II, pp. 141—143) goes on to give minute details of the domestic duties of the wife ; but as illustrative of them I may quote the more succinct text of *Sancha* and *Lichita* (ib., p. 139) :—

"For every succeeding day let the wife clean the vessels used at meals ; let her sweep the dwelling house and gate, and when clean, preserve it so ; let her provide curds, rice, *durva* grass, new leaves and blossoms for oblations ; let her reverently salute her husband's parents, and afterwards perform the necessary business of the household ; let her eat nothing before the Gods and guests are satisfied,

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nor before her husband *has eaten* except drugs *swallowed* medicinally".

Dr. Gurudas Banerji in his Hindu Law of marriage (Tagore Law Lectures, 1878, p. 118) sums up the general effect of the authorities in the following words :—

"Under the Hindu Law, as indeed under most other systems, the liberty of the wife is liable to be considerably restrained by the husband. The duty of attendance on her husband, which is so strongly inculcated, obliges her to follow him wherever he chooses to reside; and it is a general principle of law that the domicile of the wife follows that of her husband. She is also bound to refrain from going to any place where her husband forbids her to go."

I have dwelt upon these authorities especially in view of the circumstance that in such cases relating to marriage we are expressly required by s. 37 of the Civil Courts Act (XII of 1887), which has only reproduced the provisions of s. 24 of Act VI of 1871, to apply the Hindu Law and adopt that law as the rule of decision. The rules of that law are explicit in defining the reciprocal duties and obligations of the husband and the wife, and, whilst the husband is bound to maintain and support her and protect her, the wife is bound to reside with him in conjugal cohabitation, discharging such domestic functions as the law has prescribed for her. The sacred Hindu texts on the subject in describing the duties of a wife no doubt prescribe many matters of detail which can be regarded as only moral precepts, as distinguished from legal obligations, and such distinction is apparent from the context of the texts themselves, and the words in which the precepts are expressed; but I am convinced that the texts, so far as they relate to conjugal cohabitation and impose restrictions upon the liberty of the wife and place her under the control of her husband, are rules of law creating a legal right in the husband based upon the jural relation which exists between him and the wife. Such rights are not to be confounded with mere moral precepts, for they are based upon texts similar to those which impose upon the husband the corresponding duty of maintaining

his wife and discharging other obligations which the law recognizes and enforces.

To this extent, indeed, it cannot be seriously contended that the right of conjugal cohabitation is not a legal right under the Hindu Law of marriage, mutually available to the husband and the wife. What has been, however, seriously contended is, that, notwithstanding such rights being legal rights under the Hindu Law, that system does not prescribe and does not contemplate any remedy when either the husband or the wife infringes the obligations which those rights create, and that therefore a suit for restitution of conjugal rights is unknown to the Hindu Law and cannot be maintained in our Courts.

I am of opinion that this argument is unsound, both upon general principles of jurisprudence, and also as matter of Hindu Law. The maxim *ubi jus ibi remedium* is a maxim of universal application, because the law does not recognize a right which cannot be enforced. It would be needless to enter into any discussion that the rules of law and equity which justify a Court in declining to grant Specific Relief, or authorize them to impose limitations upon a right when decreed, form no contradiction of the general maxim which I have cited. I hold therefore that the right of conjugal cohabitation when infringed may, upon general principles, be enforced by a suit for restitution of conjugal rights. In *Moonshee Buzloor Ruheem* v. *Shumsoonnissa* (1), the Lords of the Privy Council said, "If the law which regulates the relation of the parties gives to one of them a right, and that right be denied, the denial is a wrong; and, unless the contrary be shown by authority, or by strong arguments, it must be presumed that for that wrong there must be a remedy in a Court of Justice."

So far as the Hindu Law as to restitution of conjugal right, is concerned, the question was raised before Mr. Justice Pinhey of the Bombay High Court in the well-known case of *Dadaji Bikaji* v. *Rukhmabai* (2), and that learned Judge, accepting the plea of the wife, who was defendant, held that such a suit was unmaintain-

(1) 11 Moo. I. A. 551. (2) I. L. R., 9 Bom. 529.

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able as it was not recognized by the Hindu Law. The decision of the learned Judge was however appealed to a Bench consisting of Sargent, C. J., and Bayley, J., (1) and the report shows that much learned and able argument was addressed to the learned Judges on both sides of the question and all the principal authorities were cited. It was there argued by Mr. Telang (*vide* p. 307), on behalf of the wife who was resisting the suit, that although the Hindu Law prescribes duties of husband and wife, it does not provide any mode of enforcing their performance, that such duties are merely religious and cannot be enforced by the Civil Courts. The learned counsel upon the authority of *Khetramani Dasi* v. *Kashinath Das* (2) drew a distinction between moral as distinguished from legal obligations and pointed out that "the Civil Courts now exercise the authority which belonged to the King when the Hindu Law books were written; so that the functions of the Court are to be ascertained by reference to what are laid down as the duties of the King"; and with this premise he affirmed that the only mode of enforcing conjugal duties was by fine to the King, and that the only case contemplated by the Hindu Law was that of a husband abandoning his wife when the only result would be a fine to the King, but that there was no provision at all for the case of a wife separating from her husband. And in the absence of such provision it must be assumed that a similar remedy or punishment would be applicable to her, but that in neither case was restitution of conjugal rights ordained or provided for. For this contention the learned counsel relied mainly upon the *Vyavahara Mayukha*, Chap. XX. (Stokes Hindu Law Books, p. 164), and emphasized it by saying that the *Vyavastha Chandrika* contained no provision for restitution. I do not think that the argument can be more ably put than the manner in which it was addressed by Mr. Telang on that occasion, and I will examine it from the Hindu Law point of view itself, especially as the learned Judges of the appellate Bench, who rejected Mr. Telang's argument and reversed the decree of Pinhey, J., based their judgment upon the state of the case-law rather than upon any consideration of the texts of the Hindu Law.

(1) I. L. R., 10 Bom. 301. (2) 2 B. L. R., A. C. 15.

Now there can be no doubt that under the system of Hindu jurisprudence the administration of justice is one of the functions of the sovereign, and that references to his authority in the Hindu Law books must be taken as a guide by our Courts in administering the Hindu Law in such cases. But, whilst this is so, it must also be affirmed as an undoubted proposition that throughout the Hindu Law texts the King, as the arbiter and dispenser of justice, is regarded as the protector of rights, the punisher of wrongs and the awarder of remedies to injured parties. Without these three powers, which must of course be exercised according to law, it would be vain to assign to the King what the Hindu Law undoubtedly assigns to him, namely, judicial functions.

What then are the behests of the Hindu Law as to the effects of marriage upon the parties thereto? To use the language of an eminent Hindu lawyer, Shyama Charan Sarkar, in his *Vyavastha Chandrika* (Vol. II., p. 480).

"The effect of marriage is the union of the bride and bridegroom, upon the performance of the nuptial ceremonies and rites, more especially by the recitation of this text of the *Veda* : 'Bones (identified) with bones, flesh with flesh, and skin with skin,' the husband and wife become as it were one person. So, *Manu* says :— The 'husband is even one person with his wife.' So also *Virhaspati* :—'In Scripture, and in the Code of Law, as well as in popular practice, the wife is declared to be half the body of her husband, equally sharing the fruit of pure and impure acts. Of him whose wife is not deceased, half the body survives'."

Such being the legal contemplation of the effects of marriage, the same learned author sums up the result of the authorities (p. 485, s. 719) by laying down that "marriage properly contracted by the performance of the nuptial rites is indissoluble, and the reciprocal relation of the married pair endures even after the natural death of one or both of them." He bases this conclusion especially on the text of *Manu* (Ch. IX, v. 46). "Neither by sale nor desertion can a wife be released from her husband; thus we fully acknowledge the law enacted of old by the Lord of creatures."

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We then have the text of *Narada* :—"It is a crime in them both, if they desert each other, or if they persist in mutual altercation, except in the case of adultery by a guarded wife".—(Colebrooke's Digest, Vol. II, p. 130, Text LXIII).

Now the argument of Mr. Telang, before the Bombay Court, was that this prohibition against desertion was only a moral or religious obligation and could not be legally enforced by the King, his power being limited to fine. The learned advocate however seems to have overlooked, or perhaps underrated, some of the sacred texts to be found in Colebrooke's Digest (Vol. II, p. 129). Text LIX is from *Narada* :—"A husband who abandons an affectionate wife, or her who speaks not harshly, who is sensible, constant and fruitful, *shall be brought to his duty* by the King with a severe chastisement".—Now reading this text as I do, it distinctly contemplates authority in the King to enforce the performance of conjugal duties by the husband, and chastisement is mentioned there as the means for enforcing those obligations. It is true, as the text of *Vishnu* (LX) shows, that "the man who deserts a faultless wife shall suffer the same punishment" as a thief, and it is also the fact that a punishment is prescribed by other sages also :—For instance *Yajnyawalcya* lays down :—

"He who forsakes a wife, though obedient to his commands, diligent in household management, mother of an excellent son and speaking kindly, shall be compelled to pay the third *of his wealth*, or, if poor, to provide a maintenance for that wife."

These and other penalties are no doubt prescribed by the law for the husband who illegally deserts his wife, but it does not follow (and indeed such a supposition is expressly contradicted by the text of *Narada* which I have already quoted) that the judicial authority of the sovereign is limited to chastisement and does not extend to enforcing the performance of conjugal obligations. The words of *Narada's* text are :—"*shall be brought to his duty by the King with a severe chastisement*"—so that the text fairly read shows that punishment is ancillary to the remedy of restitution of conjugal rights. So these texts have been interpreted by the eminent Hindu

lawyer, Shyama Charan Sarkar, in his *Vyavastha Chandrika* (vol. II, p. 487, s. 721) where he sums up the rule in the following terms :—

"Without any of the faults recognized by the law, as above, a wife must not be deserted. He who deserts a good or faultless wife must be brought to his duty by the ruling power, or compelled to pay a third of his wealth, or, if poor, to provide a maintenance for her."

This, in my opinion, is a correct statement of the Hindu Law on the subject of unlawful desertion of a wife by the husband, and it leaves no doubt in my mind that restitution of conjugal rights at the instance of the wife is contemplated by the Hindu Law.

But Mr. Telang's argument before the Bombay Court went further, as the learned advocate broadly affirmed, with reference to the Hindu Law texts, that "there is no provision at all for the case of a wife separating from her husband," and that, although the caste might interfere, the King is nowhere referred to as having any authority in the matter of a wife unlawfully deserting her husband. This argument has been repeated in this case, as indeed the other portions of Mr. Telang's argument, by the learned pleader for the respondent, who has indulged in an equally broad negative of the King's authority over a deserting wife. But it seems to me that this broad negation proceeds upon ignoring some important texts of the Hindu Law. For instance *Manu* (Ch. IX, v. 83) prescribes :—

"If a wife legally superseded shall depart in wrath from the house, she must either instantly be confined, or abandoned in the presence of the whole family."

The reasonable interpretation to be placed upon this text is that the confinement contemplated by it is a lawful confinement to be awarded by the lawful authority after some sort of adjudication, such authority being naturally the King. In other words, I am strongly inclined to hold that the confinement contemplated by the text is much the same as the imprisonment of a judgment-debtor who disobeys a decree for restitution of conjugal rights provided by s. 260 of our Code of Civil Procedure. But the authority of the King over a wife wrongfully deserting her husband does not rest

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upon this inference or analogy alone. There is an express text of *Manu*, which I quote with all the greater emphasis because it is characteristic of the ancient spirit of the Hindu Law and shows how extensive are the powers of the King in respect of wrongful desertion of her husband by the wife. The text stands in that sacred institute as verse 371 of Ch. VIII :—

"Should a wife proud of her family and the great qualities of her kinsmen, actually violate the duty which she owes to her lord, let the King condemn her to be devoured by dogs in a place much frequented."

It is true this text occurs in the chapter on Criminal Law, but, as I have repeatedly said, the Courts of justice in interpreting such an ancient system of law as Hindu jurisprudence, and in applying its rules to modern life must not forget that in those ancient times juristic arrangement of legal ideas, as now understood, was not known or recognized, and the institutes of *Manu* as a Code are themselves a very good illustration of how those sacred lawgivers mixed up religious, civil and criminal rules of law. To this I may add the observation that in regard to matrimonial disputes in particular, other systems also, such as the Muhammadan, and even the English law, do not always draw marked lines of distinction between the ecclesiastical, civil and criminal aspects of the case, and proceedings in such causes are regarded as *quasi*-criminal. Bearing this in mind it cannot be contended that the texts of Hindu Law give no temporal power to the King over a deserting wife, and that the only punishment or remedy contemplated is of a moral or religious character. It is of course clear that, once the extreme authority of the sovereign is established, the manner in which he is to protect rights or enforce them is to be regulated by the conditions of the times. Our Courts cannot of course condemn a deserting wife to any such punishment as that contemplated by the texts; but it stands to reason that if the King could in ancient times "condemn her to be devoured by dogs," our Courts in modern times must be held to have the much lesser power of imprisoning her if she, having illegally deserted her husband, refuses to obey a decree for restitu-

tion of conjugal rights under s. 260 of the Code of Civil Procedure.

I think I have said enough to show that according to the spirit and letter of the Hindu Law itself enforcement of conjugal right by judicial authority awarding restitution does not fall beyond the scope of the King's functions, and therefore not beyond the jurisdiction of the Civil Courts in modern times. This conclusion is fully borne out by a long course of authoritative decision of the Courts, as was pointed out by Sargent, C. J., in his judgment in *Dadaji Bhikaji* v. *Rukhmabai* (1), and I wish to quote a passage from that judgment, as it represents in language better than any I can use the manner in which I myself regard the subject and the views and conclusions at which I have arrived in this case. Referring to the case law on the subject, Sir Charles Sargent went on to say :—

"We could not, therefore, with propriety entertain any objection which goes to the root of the jurisdiction such as that urged by Mr. Telang, *viz.*, that the Hindu Law books do not recognize a compulsory discharge of marital duties, but treat them as duties of imperfect obligation to be enforced by religious sanction. We may, however, remark that, although no text may be found in the Hindu Law books which provides for the King ordering a husband or wife to return, no text was cited forbidding or deprecating compulsion, and that it was admitted that the duties appertaining to the relationship of husband and wife have always been the subject of caste discipline, and, therefore, that with the establishment of a systematic administration of justice, the Civil Courts would properly and almost necessarily assume to themselves the jurisdiction over conjugal rights as determined by Hindu Law, and enforce them according to their own modes of procedure."

This leads me to the second part of the argument addressed on behalf of the respondent, namely, that a definite demand by the husband of conjugal rights and refusal by the wife is a condition precedent to the maintainability of such a suit :—It is conceded that there is no text of the Hindu Law which enjoins any such

(1) I. L. R., 10 Bom 301.

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rule, but it is contended that the matter is one of procedure and must therefore be decided by affirming the necessity of an antecedent demand upon general principles of procedure. Now, so far as general principles are concerned, I am of opinion that the elopement of a wife and her wrongful withdrawal of herself from her husband's home and cohabitation with him is sufficient to constitute a cause of action for a suit for restitution of conjugal rights, the fact of the wrongful desertion itself being an infringement of a right which can be enforced. To use the language of Sargent, C. J., in *Dadaji Bhikaji* v. *Rukhmabai* (1) "the gist of the action for restitution of conjugal rights is that married persons are bound to live together, and that one or other has withdrawn himself or herself without lawful cause." Taking the analogy of other systems, the rule contained in s. 32 of the Indian Divorce Act (IV of 1869) seems to me to proceed upon sound general principles. It lays down that "when either the husband or wife has without reasonable excuse withdrawn from the society of the other, either wife or husband may apply, by petition to the District Court or the High Court, for restitution of conjugal rights, and the Court, on being satisfied of the truth of the statements made in such petition, and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly." There is nothing said as to the necessity of an antecedent demand as a condition precedent to a petition for restitution of conjugal rights, and the section seems to proceed upon the general principle of the English Law and practice of the Divorce Court till such practice was altered comparatively recently by a new rule (No. 175) by the Judge Ordinary under the power conferred upon him by statutes of Parliament. The rule is printed in an Appendix to Browne's Treatise on Divorce and Matrimonial causes (4th ed., p. 548). The general effect of the rule is that there must be a written demand of cohabitation by the petitioner and the lapse of reasonable opportunity of compliance therewith before the petition is registered; but there are some cases cited by Mr. Browne at page 90 of his work showing that the strictness

(1) I. L. R., 10 Bom, 301.

of the rule is liable to be dispensed with and its application modified in cases where personal service of the written demand cannot be had on the party respondent. The rule itself was not framed till 1869, and I am not aware that it has ever been introduced into India even in cases governed by the Indian Divorce Act. Much less am I aware of any such rule being applied by our Courts to cases of restitution of conjugal rights among Hindus.

But it is contended on behalf of the respondent as preliminary to the third part of the argument that the general rule has been altered by the provisions of Nos. 34 and 35, sch. II of the Limitation Act (XV of 1877). The former of these clauses prescribes limitation of two years for suits for the recovery of a wife, and the time from which the period begins to run is stated to be "*when possession is demanded and refused.*" Similarly the latter clause in prescribing the same period of limitation for suits for the restitution of conjugal rights states that such period is to be reckoned from the time "*when restitution is demanded and is refused by the husband or wife being of full age and sound mind.*" It is contended that the necessity of a demand being a pure matter of procedure *ad litis ordinationem*, and the law of limitation appertaining to the same branch of law, the words of the Limitation Act which I have quoted must by necessary implication be taken to abrogate, modify, or add to the rules of the personal law of the Hindus and Muhammadans on the subject, and that therefore there can be nothing inconsistent with the protection of native laws guaranteed by s. 37 of the Civil Courts Act (XII of 1887), if in such cases of restitution of conjugal rights the Court insists upon a demand and refusal *ante litem motam* being established; and throws out the suit as barred *in limine* where no such demand has been made.

I have considered this contention with all the greater anxiety as the well recognized rule of interpreting statutes cannot be ignored that the Legislature is not to be unnecessarily credited with either surplusage or inconsistency, and before I express my opinion upon this point I think it is necessary to realize the exact extent to which the argument logically leads. The argument,

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relying as it does mainly upon the words of the third column of No. 35, must necessarily involve the result that for the maintainability of a suit for restitution of conjugal rights, not only are a demand and refusal indispensable, but also that such demand or refusal must be made by the husband or the wife, when he or she is "*of full age and sound mind.*" So that, in other words, if the contention is sound, the Limitation Act must be taken to render restitution of conjugal rights unavailable either by or against minors and insane persons, and to abolish such a suit where either of the parties is suffering from such disabilities.

Then arises the serious question: Did the Legislature by framing No. 35, of the Limitation Act intend or contemplate any such serious results, involving, as they do, interference with the native personal laws of marriage and conjugal relations? In order to answer this question it is necessary to bear in mind some of the most important rules of the interpretation of statutes. "The preamble of a statute has been said to be a good means to find out its meaning, and, as it were, a key to the understanding of it, and as it usually states, or professes to state, the general object and intention of the Legislature in passing the enactment, it may legitimately be consulted for the purpose of solving any ambiguity or of fixing the meaning of words which may have more than one, or *of keeping the effect of the Act within its real scope*, whenever the enacting part is in any of these respects open to doubt." (Maxwell, p. 52). "But the preamble cannot either restrict or extend the enacting part, when the language of the latter is plain, and not open to doubt, either as to its meaning or its scope." (ib., p. 56).

Similar is the effect of what Mr. Wilberforce has stated to be the rules in his work, and I have no doubt that the preamble of a statute is the most important source of information for ascertaining the object and intention of the Legislature and the scope of the enactment. This being so, there are other equally well recognized principles of interpretation, which have been well stated by Mr. Maxwell in his well known work on the interpretation of statutes (pp. 95, 96). "Before adopting any proposed construction of a

passage susceptible of more than one meaning, it is important to consider the effects or consequences which would result from it, for they often point out the genuine meaning of the words. There are certain objects which the Legislature is presumed not to intend, and a construction which would lead to any of them is therefore to be avoided. It is found sometimes necessary to depart not only from the primary and literal meaning of the words, but also from the rules of grammatical construction when it is improbable that they express the real intention of the Legislature; it being more reasonable to hold that the Legislature expressed its intention in a *slovenly manner* than it intended something which it is presumed not to intend. One of these presumptions is that the Legislature does not intend to make any alteration in the law beyond what it explicitly declares, either in express terms or by unmistakeable implication, or in other words, beyond the immediate scope and object of the statute. In all general matters beyond, the law remains undisturbed. It is in the last degree improbable that the Legislature would overthrow fundamental principles, infringe rights or depart from the general system of law without expressing its intention with *irresistible clearness*, and to give any such effect to general words, simply because in their widest and perhaps natural sense they have that meaning, would be to give them a meaning in which they were not really used. It is therefore an established rule of construction that general words and phrases, however wide and comprehensive in their literal sense, must be construed as strictly limited to the immediate objects of the Act, and as not altering the general principles of the law."

An illustration of the application of these rules is given by Mr. Maxwell (p. 104) on the authority of *Vane* v. *Vane* (1), where "it was held that the provision of the statute of Limitations, 3 and 4 Will. IV, Cap. 27, s. 26, which deprives the owner of lands of the right of suing in equity for their recovery, on the ground of fraud, from a purchaser who did not know or have reason to believe that any such fraud had been committed, was to be construed, subject

(1) L. R. 8 Ch. 383.

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to the presumption that the Legislature had not intended, by its general language, to subvert the established principles of equity, on the subject of constructive notice, and was therefore read as meaning that the purchaser did not know or have reason to believe either by himself, or by some agent whose knowledge or reason to believe is, in equity, equivalent to his own."

I have dwelt upon these principles of interpretation because I think they apply with equal force to the statute law of British India, and I will now consider what effect they have upon the interpretation of the Indian Limitation Act (XV of 1877) with reference to the particular question now under discussion.

First, then, we find that the preamble in defining the object and scope of the enactment mentions limitation of suits, &c., and acquisition of ownership of easements and property as the subjects in regard to which legislation was undertaken. There is not a word in the preamble to show that any alteration of the nature of personal laws of marriage and conjugal relations was intended, and in the absence of explicit declaration, either in express terms or unmistakeable implication, the scope of the enactment cannot be extended beyond the preamble, unless the body of the Act points to a different conclusion by employing enacting words of "irresistible clearness." To hold otherwise would be to credit the Legislature with disturbing well-settled existing rights of persons and property by indirect and almost surreptitious methods; and this is one of the reasons why in interpreting statutes it is important to bear in mind the distinctions between words and phrases which are intended to be merely declaratory or enabling and those which are employed to convey a mandate or prohibition by directory or imperative terms. A legislative mandate cannot be evolved from inferences based upon mere use of words without expressly enacting terms, and this rule applies with especial force where a mandate or prohibition is sought to be evolved from words in the body of the Act referring to matters which fall beyond the scope and purview of the Act as represented in its preamble.

Now it is clear that the words employed in clauses 34 and 35 of sch. II of the Limitation Act are merely descriptive and in no sense enacting words conveying in themselves any mandate or prohibition. The first column describes the nature of suits, the second mentions the period of limitation, and the third states the starting point of such period. Taking the three columns together by themselves there are no enacting words expressing any mandate or prohibition, directory or imperative in its nature, and it is only when they are read with the enacting s 4 of the enactment that they can have any permissive or prohibitive efficacy. But what does s. 4 say? It simply lays down that suits, &c., filed after the period of limitation prescribed therefor by the second schedule of the Act shall be dismissed. It does not say that words and phrases employed in the third column of the schedule to describe the starting point of the period of limitation are intended to serve more than a descriptive purpose, and that from them may be evolved rules conveying mandate or prohibition, abrogating, modifying or adding to the rules of the substantive laws falling beyond the scope and purview of the preamble. Holding these views I am unable to hold that the words in the third column of No. 35 of the Limitation Act are to be read or interpreted as if the statute laid down the following propositions :—

(1) No suit for the restitution of conjugal rights shall be maintained unless restitution is previously demanded and refused.

(2) No suit on behalf of a minor, or a person of unsound mind, for restitution of conjugal rights shall be maintainable.

Yet such is the necessary logical result of the contention for the respondent in this case. I hold that the words in the third column of Nos. 34 and 35 are merely descriptive of the starting point of the period of limitation, that they only proceed upon an assumption that the Native laws governing marriage and conjugal relation require a demand, but that they are not enacting words laying down any rules involving any abrogation or modification of the Native laws or addition to them. They must be taken to leave the Native laws undisturbed, and the effect of the two articles

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cannot therefore be more than that of furnishing a general indication that the Legislature intended two years to be the period of limitation for such suits to be calculated from the starting point described in the third column, where such description applies; but that in other cases the matter would be governed by the ordinary rules of applying limitation calculating it from the time when the right to sue accrues. In other words, I hold that in cases where the personal law of the parties does not require antecedent demand, nor deprives minors and persons of unsound mind of the conjugal rights of cohabitation, No. 35 of the Limitation Act has no application, nor No. 34, but that the suit would fall under the general provisions of No. 120 of the Limitation Act. This interpretation no doubt impairs and fritters away the efficacy of Nos. 34 and 35 by limiting their applicability, but I am afraid such must necessarily be the case where the Legislature employs terms which either omit to provide for cases which may arise, or which limit the application of any particular rule to any particular class of cases. Instances of this are to be found in the reported cases.

In *Nath Prasad* v. *Ram Paltan Ram* (1) a Full Bench of this Court, whilst deploring the anomaly which their ruling involved, held that No. 10 of the Limitation Act, which provides one year's limitation for suits for pre-emption, did not apply to a suit to enforce a right of pre-emption in respect of a conditional sale of a share of an undivided *mahal*, and that such suit therefore fell under the general provisions of No. 120 which prescribes six years' limitation. This was followed in *Rasik Lal* v. *Gajraj Singh* (2) and *Ashik Ali* v. *Mathura Kandu* (3) and the rule was carried further in *Durga* v. *Haidar Ali* (4) and *Udit Singh* v. *Padarath Singh* (5).

Nor is the applicability and efficacy of Nos. 34 and 35 impaired and frittered away only by the considerations which I have described.

(1) I. L. R., 4 All 218.
(2) I. L. R., 4 All 414.
(3) I. L. R., 5 All. 187.
(4) I. L. R, 7 All. 167.
(5) I. L. R, 8 All. 54.

Their efficacy, as furnishing a bar by limitation, is almost dissipated also by other considerations which I now proceed to discuss. I have already pointed out that the only enacting words which convey a mandate rendering these two articles operative as bars by limitation, are the terms of s. 4. of the Limitation Act, which imperatively require the dismissal of suits instituted after the lapse of the period of limitation prescribed in the second schedule. But this imperative mandate in express terms qualifies itself by subjecting the limitation contained in the schedule to the provisions contained in s. 5 to s. 25 of the Limitation Act. One of the most important of those sections is s. 23 which runs as follows :—

"In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues."

Before I discuss the effect of this section I must point out that the section as it now stands in the Limitation Act (XV of 1877) has taken the place of ss. 23 and 24 of the old Limitation Act (IX of 1871), the former of which related to successive and continuing breaches of contract whilst the latter was confined to cases of *continuing nuisances*" and provided fresh periods of limitation and fresh rights to sue. The present section has abrogated both those sections and lays down a much wider rule prescribing a fresh period if limitation beginning at every moment in the case of continuing breaches of contract and continuing torts alike. Another change is that the present No. 34 stood as No. 41 in Act IX of 1871, and the present No. 35 stood as No. 42 in the same Act, without the words "*by the husband or wife being of full age and sound mind.*"

With reference to the law standing as it did under the Limitation Act IX of 1871, a Full Bench of the Panjab Chief Court, consisting of Messrs. Plowden, Smyth, and Elsmie, had to consider the case of *Gaizni* v. *Mussammat Mehran* (1) which was a suit between Muhammadans of a nature similar to this, and the Judges formulated the question for decision in the following words :—

(1) Pan. Rec., Vol. 14, p 157.

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"In a suit between Muhammadan parties when a husband claims as against his wife restitution of conjugal rights, and, as against the person detaining her, recovery of his wife, such suit being instituted more than two years after a demand and refusal *(a)* of restitution of conjugal rights, and *(b)* of possession of his wife, the relation of husband and wife still subsisting, is the suit barred *(a)* as against the wife by No. 42 of schedule II of Act IX of 1871, *(b)* as against the other defendant by No. 41 of the same schedule."

In answering the question Sir M. Plowden, who delivered the leading judgment in the case, after stating that "it is abundantly clear that according to the Muhammadan Law marriage is a civil contract, that it imposes upon the wife the obligation of cohabiting with her husband, unless there be just cause for withholding herself, and that a suit will lie to compel her to return to him," went on to say :—

"This being so, the unjustifiable withholding of her person by the wife is a breach of the contract of the marriage, and a breach which continues so long as her person is so withheld; and upon consideration I can find no sufficient ground for holding that this is not a continuing breach of contract within the meaning, as it is within the terms, of s. 23 of the Limitation Act. Then if that section applies, as it appears to me that it does, No. 42 of the schedule does not govern the disposal of a suit of the kind under notice." The learned Judge then pointed out that No. 42 (which corresponds to No. 35 of the present Act) was overridden by s. 23 which rendered it "inoperative in respect to a suit like the present by a Muhammadan husband against his wife." The learned Judge further explained himself by saying :—

"It does not by any means follow that No. 42 is rendered wholly inoperative by s. 23, for it will continue to be applicable to all suits of the kind described where by the general law of those parties marriage is not a civil contract, and to which, consequently, s. 23 is not applicable. Virtually, therefore, the suit of a Muhammadan husband against his wife for recovery of his wife is not capable of being barred by limitation."

Before quoting further from the judgment, I wish to point out that the distinction which the passage I have just quoted draws between marriage when it is a civil contract and marriage which is a sacrament, as among the Hindus, ceases to have any effect in view of the circumstance that s. 23 of the present Limitation Act applies equally to "*a continuing breach of contract*" and "*a continuing wrong independent of contract,*" so that the reasoning of the learned Judge would now apply equally to the case of Hindu marriages. For the same reason no distinction would remain between the effect of s. 23, upon suits for recovery of a wife (No. 41, Act IX of 1871, corresponding to No. 34 of the present Act) against a third party, and suits for restitution of conjugal rights against the wife (No. 42, Act IX of 1871, corresponding to No 35 of the present Act), for, in the former case there would be a continuing wrong by a person who is no party to the contract of marriage, and in the latter case there would be a continuing breach of contract by a party to the contract, the continuing infringement of the obligation in either case being covered by s. 23 of the present Act.

After specifically laying down that suits for restitution of conjugal rights among Muhammadans could not be barred by any limitation so long as the marriage subsisted, the learned Judge made further observations which would apply to Hindu and Muhammadan marriages alike, so far as limitation of suits for restitution of conjugal rights is concerned. He observed :—

"I may add, before quitting this point, that practically the same result would be reached, that is to say, that the husband could enforce by action his right to recover possession of his wife, after any length of time, if it be held that s. 23 does not apply to a contract of marriage, and that the withholding of herself by the wife is not a continuing breach of contract within that section. For if it be supposed that No. 42 does apply, and a suit for restitution of conjugal rights were dismissed upon the ground that the suit had not been brought within two years of the demand and refusal proved, it would still, in my opinion, be competent to the husband

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to make a fresh demand and institute a fresh suit if it were not complied with. The marriage would still subsist and the right to the wife's society would likewise subsist, and there would be, quite independently of s. 23 of the Act, a right to compel the wife to fulfil her obligations. There is no provision in the Act, similar to that in s. 29 as to suits for the possession of land or an hereditary office, extinguishing the right of the husband to the society of his wife, and the mere dismissal of the former suit on a plea of limitation would not bar the second suit to enforce the right."

As to the limitation (under No. 41 of Act IX of 1871, corresponding to No. 34 of the present Act) against a third party who was harbouring a wife, the learned Judge held that s. 23 of the old Act (IX of 1871) was not applicable, as it related to continuing breaches of contract, nor was s. 24 applicable, being limited as it was to one kind of continuing injury only, namely, a continuing nuisance, and the suit would therefore be barred by two years' limitation from the date of demand and refusal. This distinction, as I have already stated, vanishes in view of the more comprehensive nature of the provisions of s. 23 of the present Act, and moreover, as the learned Judge himself points out towards the end of his judgment, his reasoning as to the practical efficacy of a repeated demand in defeating limitation is applicable alike to suits against the wife and against a third party who is harbouring her.

The views thus expressed by Sir M. Plowden, as the Senior Judge of the Panjáb Chief Court, were adopted by his learned colleagues, and I have quoted them at such length, as the case in which they were expressed is the only reported ruling to be found in the published reports. There appears, however, to be a decision of the Bombay High Court in *Hemchand Harjivan* v. *Shiv* which is inaccessible to me, as it does not appear in any of the authorized reports, but is referred to by Mr. Starling in his note on s. 23 and No. 35, as having been printed in some printed judgment of the Bombay High Court for 1883, at pp. 124—26. It is also cited in Mr. Mittra's work on Limitation (2nd ed., p. 512), and he states

that the case is referred to in Branson's Digest of *unreported* judgments of the Bombay High Court at p. 210. The effect of the ruling is represented by Mr. Starling to be that the refusal of a wife to return to her husband and allow him the exercise of his conjugal rights, and the retention of the wife by a man in whose house she is living constitute continuing wrongs, giving rise to constantly recurring causes of action, of demand and refusal, and the learned author in summing up the effect of the Panjáb case and of the Bombay case states the law to be that "the right of a husband to the possession of his wife is one which continues so long as the marriage bond continues, consequently it would seem that so often as he chooses to demand possession of her or restitution of conjugal rights, and is refused, so often would a new cause of action arise. The practical result of this is that there would be no limitation to his bringing a suit for possession or restitution so long as he brought it within two years from some demand and refusal" (Starling's Limitation Act, p. 107).

The Panjab case was a suit between Muhammadans, whilst the Bombay case was a suit between Hindus, and I agree in those rulings so far as they lay down that the jural relation created by marriage involves the continuing obligation of conjugal cohabitation upon the husband and the wife, that so long as this jural relation subsists the unlawful infringement of the obligation, whether by the husband or the wife, or by a third person (as in the case of one who harbours a runaway wife) amounts to a continuing wrong or breach of the obligation within the meaning of s. 23 of the present Limitation Act (XV of 1877), so that "a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues."

It is not necessary for me in this case to determine how far I am prepared to accept those rulings in so far as they may be understood to lay down that successive demands and refusals are either required or could be made as foundations of successive actions for restitution of conjugal rights with the result that there would be no limitation or any other plea *in limine* barring such suits so long

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as they were brought within two years from some demand and refusal. I may, however, observe that much doubt and difficulty have arisen in consequence of not realizing clearly the distinction between a demand which by the substantive law forms an essential element of the cause of action, that is, the gist of the action, and, as such, a condition precedent to the enforcement of the right by suit, and demands which do not constitute the gist of the action and which therefore the law does not render indispensable.

Of the former class a very apt illustration is to be found in the rule of the Muhammadan Law of pre-emption, which renders the preliminary demands necessary as conditions precedent to the enforceability of the right, and the omission of which would render the suit unmaintainable. Of the latter class of demands, namely, those which are optional, illustrations are furnished by the Limitation Act itself in Nos. 59 and 73, where, although the agreement rendered the money payable on demand, the date of the loan in the one case, and the date of the bill or the note in the other, are the starting points of limitation, so that a suit may be maintained without any previous demand. Whether such a rule is well-founded in jurisprudence is a subject of considerable interest and was well discussed by Sir Louis Jackson in *Tarini Prasad Ghose* v. *Ram Krishna Banerji* (1) where, upon the authority of the views of Austin, the learned Judge held that demand was of the essence of the cause of action, whilst Holloway, J., in *Eathamukala Subbammah* v. *Rajiah* (2) and *C. Venkataramanier* v. *Munshe Reddy* (3) strenuously repudiated the doctrine of Austin and held that the absence of demand and refusal in the case of a confessing defendant was only a matter affecting the question of costs. I need not, however, enter into a discussion upon this question, because, for the purposes of this case, it is enough to hold, as I have said, that the Hindu Law of marriage does not prescribe a previous demand and refusal of conjugal rights as a condition precedent to the enforcement of those rights against a wife who unlawfully withdraws herself from cohabitation with her husband, and that therefore the provisions of s. 23

(1) 6 B. L. R., 160. (2) 7 Mad. H. C. Rep., 293.
(3) 7 Mad. H. C. Rep, 298.

of the Limitation Act, to which Nos. 34 and 35 are subject, save this suit from being barred by limitation, either against the wife, or the third party who is harbouring her, although the demand and refusal of conjugal rights was superfluously made in this case about five years before suit. The effect of my view is to apply the general No. 120 to the present case, and, reading it with s. 23 of the Act, to hold that limitation does not bar the suit, either against the wife, or against the other person who is harbouring her, and to entertain this suit without requiring the plaintiff to accept the dismissal of this suit, and to make a fresh demand as the foundation of another suit against the same parties, and for the same relief. It is not necessary for me to decide whether such a second suit would be maintainable, because this is not such a second suit. At all events, considering the rulings of the Panjáb Chief Court and the Bombay High Court, and the views which I have expressed here, I cannot help feeling that it would have been much better if the Legislature had altogether omitted to frame Nos. 34 and 35 of the Limitation Act, for conjugal disputes among Hindus and Muhammadans are governed by the general provisions of their personal laws, and, as I have already shown, No. 120 is sufficient to make provision for them. Such an omission to provide any special periods of limitation for conjugal disputes among the native population, would be consistent with the policy upon which clause (*a*) of s. 1 of the Act proceeds by saving from limitation suits under the Indian Divorce Act. The practical effect, however, as I have shown, is much the same, for Nos. 34 and 35 must be read as inapplicable to suits such as the present, and therefore virtually superfluous. Any other view of those articles would in effect amount to holding that the lapse of two years after demand and refusal of conjugal rights would either amount to dissolution of marriage or divorce, or separation irremediable by law. In other words, such an interpretation would involve the conclusion that the Legislature by a side-wind effectually introduced divorce into the Hindu Law, of which the spirit abhors the notion, and the letter does not recognize it, and that in the case of Muhammadans a serious innovation has been introduced by the statute of which the scope and objects did not contemplate

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any interference with their Native Law of marriage and conjugal relation. I have already said enough to show why I cannot credit the Legislature with any such intentions and also why I repudiate any such interpretation as would involve such serious results.

I now pass on to the fourth point of the argument on behalf of the respondent, namely, that under the circumstances of this case the defendant, Musammat Kaunsilia, must be treated as a deserted wife and no longer amenable to her husband's, the plaintiff's, demand for restitution of conjugal rights under the Hindu Law.

It is clear that under s. 37 of the Civil Courts Act (XII of 1887) we are bound to decide this question according to the Hindu Law. That law contains in itself provisions for justifying a woman in forsaking her husband, and enumerates the conditions under which she may do so. The text of *Devala* translated by Colebrooke (Digest, Vol. II, page 164, text CLI.) lays down :—

"A husband may be forsaken by his wife, if he be an abandoned sinner, or an heretical mendicant, or impotent, or degraded, or afflicted with phthisis, or if he have long been absent in a foreign country," and it goes on to say (text CLII.) "whether such a husband be alive or dead, his wife may take another lord, for the sake of obtaining progeny, not through female independence." Then the same author (Vol. II, at pp. 165-66, texts CLIV and CLV) cites texts describing the period for which an absent or missing husband is to be waited for by the wife before she can take another husband, and this period varies according to the caste or class to which the parties belong. The *Vyastha Chandrika* of Shyama Charan Sarkar (Vol. II, page 489) quotes a text of *Parashara*. "If the husband be missing, dead, quit the condition of a householder, be impotent, or degraded; in (any of) these five calamities it is lawful for a woman to have another husband," and the learned author comments upon the text by saying:—"Thus *Parashara* having declared it lawful for a woman to take another husband in case her former husband be in one of the said circumstances, *à fortiori* then it must be inferred that according to his doctrine a woman may desert her husband when so circumstanced." Sir

William Macnaghten in his work on Hindu Law (Vol. I, p. 61) states the law in the following words:—

"Adultery is a criminal but not a civil offence, and an action for damages preferred by the husband will not be against the adulterer. It is not a sufficient cause for the wife to desert the husband and there are not many predicaments in which such an act on her part is justifiable. Insanity, impotence and degradation, are, perhaps, the only circumstances under which her desertion of her husband would not be considered as a punishable offence." In this passage the learned author adds the husband's *insanity* to the list of justifiable grounds for his wife's forsaking him and the authority on which he relies is the text of *Manu* (Chap. IX, v. 79). "She who is *averse* from a mad husband, or a deadly sinner, or an eunuch, or one without manly strength, or one afflicted with such maladies as punish crimes, must neither be deserted nor stripped of her property." The author of the *Dattaka Chandrika* (Vol. II, p. 489 foot note) contests this view, and, adopting the interpretation of *Kulluka-Bhatta* interprets the *aversion* from a husband to mean only want of diligent attention to him, and the author then affirms that there is no authoritative text to support the view that *insanity* of the husband would justify a wife in forsaking him. This view is in keeping with the corresponding right of the husband in the text of *Devala* (Colebrooke's Digest, Vol. II, text LXII, p. 129 which lays down that:—"A man may exclude from his bed or from pilgrimage a wife who is afflicted with leprosy, degraded from her class, barren, or insane, whose courses are stopped, or who is wicked, but he may not exclude her from all business." I am therefore inclined to agree with the author of the *Dattaka Chandrika* in the opinion that insanity is not a legal ground for desertion either of the husband or of the wife any more than it would be under the English law. I also agree in the view (at p. 490) that, "although a married pair can desert each other under the circumstances above noticed, yet desertion does not render their marriage dissolved, for *Manu* says: neither by sale nor *desertion* can a wife be released from her husband—thus we fully acknowledge the law enacted of old by the Lord of creatures." (Chap IX, v. 46).

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From what I have said it seems clear to me that, under the Hindu Law, desertion does not terminate the jural relation created by the sacrament of marriage, and that it is only in certain specified circumstances that the parties may forsake each other; and it follows as a corollary that where the husband or the wife deserts the other without lawful cause, a suit for restitution of conjugal rights would be maintainable, and could be successfully resisted only by establishing that a legally sufficient cause for desertion existed and continues. This view seems to me just and reasonable on general principles and is supported by the analogy of the English law, which lays down that "in a suit for restitution of conjugal rights no facts are sufficient to bar the proceeding except such as would be sufficient to have entitled the parties to a divorce on an original suit. Facts pleadable in bar to a suit for restitution are such only as, upon proof, will entitle the party who pleads them to a sentence of separation, such sentence being prayed for" (Browne's Divorce, 4th edition, p. 140,), a similar rule has been adopted in the Indian Divorce Act, of which s. 33 lays down that "nothing shall be pleaded in answer to a petition for restitution of conjugal rights which would not be ground for a suit for judicial separation, or for a decree of nullity of marriage."

What would be sufficient cause for divorce or for judicial separation must necessarily depend upon the personal matrimonial law of the parties concerned, so that in this case the Hindu Law would govern the decision of the question, and, as I have already said, that law does not provide that unlawful desertion whether by the husband or the wife would clear a suit for restitution of conjugal rights. Even under the English Law desertion was not formerly held to constitute a ground for judicial separation, and it was the rule that the remedy for desertion was restitution. Mr. Browne (p. 46) quotes the words of Sir William Scott in *Evans* v. *Evans*:—

"To say that the Court is to grant a separation, because the husband has thought fit to separate himself would be to confirm the desertion, and to gratify the deserter."

The author then, on the authority of *Manning* v. *Manning* (1) says that "according to *the law of Ireland*, desertion by a wife, even though wilful, is no bar to a suit by her for restitution of conjugal rights," but that "it is very questionable how far this decision is in accordance with English Law." (p. 142). He goes on to point out (p. 46) that "recent legislation, however, has expressly recognized desertion as a ground for judicial separation," and he explains that "to sustain the charge of desertion, the act relied upon as such must have been done *contrary to the will of the person charging it.*" The same is the rule adopted in clause (9) of s. 3 of the Indian Divorce Act, which lays down that "*desertion* implies an abandonment against the wish of the person charging it," and it is clear that it is only such desertion which under s. 22 of the Act would constitute a ground for judicial separation, or furnish a defence under s. 33 to a suit for restitution of conjugal rights. "No one can desert who does not actually and wilfully bring to an end an existing state of cohabitation; if the state of cohabitation has ceased to exist, whether by the adverse act of husband or wife, or even by the mutual consent of both, desertion becomes impossible to either, at least until their common life and home has been resumed; the refusal by either, after request of the other, to resume conjugal relations does not constitute the offence of desertion." (Browne, p. 47). But "though the separation be not desertion in its inception it may become such afterwards; for where a husband whilst living apart from his wife, under circumstances which did not constitute desertion, suddenly broke off all communications with her, and formed an adulterous connexion with another woman, it was held that these facts showed that the husband had resolved to abandon his wife, and therefore constituted desertion," (ib. p. 49).

What facts would constitute complete desertion under the Hindu Law does not clearly appear from the texts, and if I have referred to the English Law upon the subject, it is because, following the example of Sargent, C. J., in *Dadaji Bhikaji* v. *Rukhmabai* (2), I think that the analogy furnished by that law may be

(1) 7. Ir. R. Eq. 520. (2) I. L. R. 10 Bom. 301.

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applicable to this case, as a rule of justice, equity and good conscience which must necessarily be applied where the law upon any particular point is totally silent. Under the English Law as under the Indian Divorce Act, "*desertion without reasonable excuse for two years or upwards*" would under s. 22 constitute a ground for judicial separation and would under s. 33 defeat a suit for restitution of conjugal rights. But this rule is the creation of the statute and does not rest upon any such general principle as would justify its importation into the Hindu Law, either in respect of allowing judicial separation or in respect of adopting the arbitrary period of two years' desertion as a valid defence to a suit for restitution of conjugal rights. But the broad advantage of consulting the English Law upon the subject remains, because by analogy it affords valuable help in deciding what amounts to desertion, and in holding that where there has been desertion for a lengthened period, such desertion, in conjunction with the other circumstances of the case, may constitute one of the elements of considering whether the Court should decree restitution of conjugal rights.

Whether any such discretionary power exists in our Courts in dealing with such suits under the Hindu Law, is the subject of the fifth and last point in the argument for the respondent. Under the English Law "if a wife does not prove that she was justified in withdrawing from cohabitation, either by proving her husband's adultery or cruelty, the Court will pronounce her under the obligation to return. Nor has the Court any discretionary power to refuse a decree in a suit for restitution of conjugal rights, on the ground that the suit was instituted by the petitioner, not in order that he might regain the society of his wife, but for some collateral object; the petitioner in a suit for restitution of conjugal rights is entitled to a decree, unless he is proved to have committed a matrimonial offence; which would be ground for a judicial separation." (Browne, p. 89).

This rule which in English Law is based principally upon the authority of *Scott* v. *Scott* (1) was applied by Sargent, C. J., to

(1) 34. L. J. P. M. and A. 23.

the case of Hindus in *Dadaji Bhikaji* v. *Rukhmabai* (1) where the learned Chief Justice said :—"It may be advisable that the law should not adopt stringent measures to compel the performance of conjugal duties, but, as long as the law remains as it is, Civil Courts, in our opinion, cannot, with due regard to consistency and uniformity of practice (except perhaps under the most special circumstances), recognize any plea of justification other than a marital offence by the complaining party, as was held to be the only ground upon which the Divorce Courts in England would refuse relief in *Scott* v. *Scott*."

But whilst the rule has been so laid down by the Bombay High Court, Garth, C. J., in *Jogendronundini Dossee* v. *Hurry Doss Ghose* (2) said : "Now, although we entertain no doubt that, as a matter of law, a suit for restitution of conjugal rights may be maintained by a Hindu in this country, we are not at all prepared to say that the same state of circumstances which would justify such a suit, or which would be an answer to such a suit in the case of a European, would be equally so in the case of a Hindu. The habits and customs of a native community, especially as regards the marriage state, are so different from ours, that we think in such a matter as a suit for restitution of conjugal rights the Hindu and the European cannot always be fairly judged by the same rules." The proper rule in such cases was laid down by the Lords of the Privy Council in *Moonshee Buzloor Ruheem* v. *Shumsoonnissa* (3). Since the rights and duties resulting from the contract of marriage vary in different communities, so specially in India, where there is no general marriage law, they can be only ascertained by reference to the particular law of the contracting parties." In the present case the wife among her pleas pleaded both desertion and cruelty, and whilst I have already dealt with desertion, I think it is necessary to consider the Hindu Law also as to legal cruelty, as a defence to a suit for restitution of conjugal rights. The text of *Manu* (Ch. V, v. 154), which I have already quoted, prescribes that even a wicked

(1) I. L. R., 10 Bom. 301 (2) I. L. R., 5 Calc. 500.
(3) 11 Moo. I. A. 551.

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husband and misbehaved "must constantly be revered as a god," whilst another text (Ch. VIII, v. 299) allows that wives "may be corrected when they commit faults, with a rope or a small shoot of cane." There are not many texts which describe the husband's behaviour of kindness towards his wife, but there are passages which indicate that kind and gentle treatment should be extended to virtuous wives. *Manu* (Ch. III, v. 55) lays down that "married women must be honoured and adorned by their fathers and brethren, by their husbands and by the brethren of their husbands, if they seek abundant prosperity," and there are other texts (vv. 56-62) which go to show that kind treatment to wives is prescribed in terms, which, by a liberal interpretation, may be taken to be not only moral and religious precepts but to amount to legal obligations. It is only from inferences which may be drawn from such texts that the prohibition of cruelty may be evolved; but there is no precise text to show that under the Hindu Law, which throughout favours the husband's control, even cruelty would justify a wife in deserting her husband or in forsaking cohabitation with him. The general principles of humanity upon which our Courts act in such matters have, however, led to a long course of decisions which recognize the rule that legal cruelty of the husband would be a sufficient cause for refusing restitution of conjugal rights, or otherwise affect the claim. The Lords of the Privy Council in *Moonshee Buzloor Ruheem* v. *Shumsoonnissa* made certain observations which seem to be equally applicable to Hindu and Muhammadan cases and which must now be taken to enunciate the rule which must be followed by the Courts in British India. They said :—"It seems to them clear that if cruelty in a degree rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him, for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court, and, as their Lordships have already intimated, there may be cases in which the Court would qualify its interference by imposing terms on the husband."

In *Yamunabai* v. *Narayan Moreshvar Pendse* (1), the Bombay High Court laid down that the Hindu Law on the question what constitutes legal cruelty sufficient to bar a claim for restitution of conjugal rights would not differ materially from the English Law; that to constitute legal cruelty there must be actual violence of such a character as to endanger personal health or safety, or there must be reasonable apprehension of it, and that mere pain to mental feelings, such for instance as would result from an unfounded charge of infidelity, however wantonly caused or keenly felt, would not come within the definition of legal cruelty.

I think the principles thus laid down are applicable to this case, and must govern the decision of the plea of cruelty set up by the defendant Mussammat Kaunsilia. I may notice here another point of similarity between the Bombay case and this case, that there the husband was "admittedly a man of very low mental capacity, on the border line of idiocy", and here the learned Judge of the lower appellate Court in his finding upon remand has observed that "the plaintiff is a half demented old man and he is not even aware that he brought a suit in the Munsif's Court for the recovery of his wife, and that it is therefore clear that some one else has put him up in this case." The Bombay Court did not regard mental weakness of the husband as a sufficient ground for refusing restitution of conjugal rights, nor would I in this case allow such a plea to prevail.

The case of *Moola* v. *Nundy* (2) furnishes an illustration of a peculiar class of cases. There a Hindu husband and a wife had been married thirteen years ago, whilst the latter was a girl of about 13 years of age. She had cohabited with him for a few months but was ill-treated and expelled by him in consequence of his having formed an illicit connection with his brother's widow, whom he made an inmate of his house, and had three children by her, and was still keeping her as his mistress. The wife ever since her expulsion by her husband had been living with her father and the husband had not contributed to her support. It appeared that the dispute had been considered by a *panchayat* which adjudged a

(1) I. L. R., 1 Bom. 164. (2) N.-W. P. H. C. Rep. 1872, p 100.

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separation of the married couple. In these circumstances a Division Bench of this Court, consisting of Stuart, C. J., and Pearson, J., declined to enforce restitution of conjugal rights without deciding whether the verdict of the *panchayat* dissolved the marriage. They observed :—" For the purposes of this suit it is sufficient to observe that 13 years ago they consented to separate, and that looking to the circumstances under which that separation took place, and to the circumstances *still existing*, we are of opinion that the plaintiff is not entitled to have that arrangement set aside without Mussammat Poonia's consent, nor are we aware that the opinion expressed by us is contrary to any provision of the Hindu Law." I am not prepared to say how far I can regard that decision as consistent with the Hindu Law, but the facts of the case are very peculiar, and I need not further discuss it, as no similar facts are alleged to exist in this case. The ruling is however an authority for holding that the Court may, in exceptional cases, exercise judicial discretion by withholding relief of restitution of conjugal rights.—In *Jogendronundini Dossee* v. *Hurry Doss Ghose*, (2) the husband appeared to have lived a very profligate life, and was in the habit of consorting openly with prostitutes, and on several occasions had insulted his wife by introducing one of them into her private apartments. He was moreover given to intemperance and whilst under the influence of intoxication had ill-treated and threatened his wife with knives and other weapons in such a way as to induce very natural apprehensions on her part for her own personal safety. Under these circumstances she left his house and went to live with her mother under the protection of her own family. He however paid visits to her there, and cohabited with her as man and wife. Garth, C. J., held that the circumstances of the case showed condonation on the part of the wife, of which the effect was not undone by reason of a slap on the face, which was given with the open hand at a time when the husband was under the influence of drink and in a moment of irritation when his wife was worrying him for money.

The learned Chief Justice, with the concurrence of Pontifex, J., decreed the claim for restitution of conjugal rights, qualifying their

(2) I. L. R., 5 Calc. 500.

decree by saying, "But we think it right, after what has occurred, to secure the defendant a home untainted by the presence of any persons of bad character, and we therefore propose so far to modify the decree of the lower Court, as to make it a condition that the house which the husband provides shall be in every respect fit for the reception of a virtuous and respectable wife." Again the case of *Paigi* v. *Sheo Narain* (3) is one in which my brother Straight held that under the Hindu Law the fact that a husband had had adulterous intercourse with another woman which had ceased at the time of suit, was not an answer to a claim by him for restitution of conjugal rights so long as the marriage subsisted, but that the Court was bound not to disregard any reasonable objections, such as personal injury or cruelty at the hands of the husband, or that he was actually living in adultery with another woman, or that if she resumed cohabitation with him she might be outcasted, and under the circumstances of the case he held that in decreeing a claim for restitution of conjugal rights, a Court was entitled, if it saw good reason to do so, while recognizing the Civil rights of a husband to his wife, to put such conditions upon the enforcement of his rights by legal process as the circumstances of the case might fairly demand, and that, applying this principle to the present case, the defendant might reasonably ask the Court before compelling her to return to her husband to make it a condition that he should first obtain his restoration to caste.

These cases I think are sufficient authorities for holding that a Court in dealing with cases of conjugal rights will not upon right grounds decline to award relief; that it will ordinarily abide by the precepts of the Hindu Law itself in determining such questions, and will decree the claim unless a sufficient reason to justify the wife under the Hindu Law in forsaking her husband is shown; that in exceptional cases it will exercise a sound judicial discretion by imposing conditions upon a decree to secure the welfare of the wife. The mere taking of a wife's jewel or the marrying of a second wife has been held to be no bar to a husband's claim for restitution of

(3) I. L. R., 8 All. 78.

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conjugal rights (1) and I do not think that *past* cruelty any more than past adultery of the husband would constitute a sufficient defence under the Hindu Law to such a suit, and I hold that in cases between Hindus, whilst past cruelty would furnish good reason for apprehending cruelty in the future, a Court would not be justified in dismissing a suit for conjugal rights where the circumstances would warrant the conclusion that no cruelty in the legal sense is to be apprehended, and the welfare and the safety of the wife can be secured even if the suit is decreed.

For these reasons and since the lower appellate Court has not tried the case upon the merits, I would decree this appeal, and, setting aside the decree of that Court, remand the case under s. 562, Civil Procedure Code, for trial upon the merits and passing such a decree as the circumstances of the case may require after adjudication, with reference to the observations which I have made. Costs will will abide the result.

STRAIGHT, J.—I think it right only to add this much that the elaborate and exhaustive examination of the points arising in the case by my brother Mahmood and the conclusions which he has arrived are the same that I had formed at the close of the hearing of the argument of the appeal, and that the only reason that the judgment was reserved for consideration was that my brother Mahmood had some little doubt upon the matter. The doubt has now been dispelled, and I am glad to think that we have what appears to me to be a most complete and unanswerable argument presented to establish the propriety of those conclusions to which I have referred. I concur in the order that has been made.

Cause remanded.

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(1) 17 W. R., 522—1 Mad. H C. Rep., 375; 24 W. R, 377.

PRIVY COUNCIL.

P C.
J. C.
1890
July 8th.

RAM CHARAN, APPELLANT *v.* DEBI DIN AND OTHERS, RESPONDENTS.

[On appeal from the High Court for the North-Western Provinces.]

Hindu law—Evidence of partition of joint family—Presumption.

In a suit to enforce an alleged right of one brother against another, to separate proprietary possession of a share in joint family estate, the concurrent findings of the Courts below were definitely to the effect that a partition had taken place, after which the brothers had been no longer joint as to their interests.

The Courts had fully gone into the case on either side, receiving the evidence offered by either party, and they had considered the whole of it. Therefore, it could not be effectively urged, as a ground of appeal, that the Courts below, in coming to the above conclusion, had erred in putting the burden of proof unduly upon the plaintiff, or disregarded the presumption arising from the original state of the family.

APPEAL from a decree (3rd July 1885) of the High Court, affirming a decree (14th July 1881) of the Subordinate Judge of Cawnpur.

The plaintiff claimed a one-half share of joint family property, suing his only and elder brother, the first and principal defendant, with whom two sons, a grandson, and a deceased son's widow, were joined as co-defendants interested in the subject-matter. The plaint (29th July 1880) alleged that both brothers had jointly succeeded to the estate of their father, Jian, who died about the year 1828, consisting of an eight-anna share in mauza Bibrapur, and a smaller share in mauza Bakothi, besides household and other property: that the brothers continued joint, trading with the ancestral funds: and that about thirty-eight years before this suit their father's brother, Nayan, who had survived, was separated off. It was stated in the plaint that the joint property comprised shares in ancestral villages in the Cawnpur and Farrukhabad districts, which stood in the Collectorate books in the names of the two brothers, Umrao Singh, the plaintiff, and Debi Din, the first defendant, as joint proprietors; other shares in other villages were entered in their names separately; and shares in villages had been purchased out of the joint family funds, in the names, respectively, of Beni

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Madho, son of Debi Din, and of Ramcharn, son of Umrao Singh; also other shares had been entered in the name of Mussammat Pem Kuar, widow of Beni Madho, and in the name of Bhima, son of Debi Din, subsequently to Beni Madho's death. Shares in villages purchased out of the joint family funds, had been recorded in the names of Pem Kuar and Ganga Sahai, after a purchase at a sale upon a decree obtained by Beni Madho in his lifetime. Also were claimed shares in gardens, groves, indigo factories, debts, and decreed debts, jewels, and furniture; the whole being valued at Rs. 1,68,811.

The plaintiff's case was that the brothers remained joint in estate, and that the parties were in possession of all the villages, and of the profits of the joint trading concerns, including an indigo factory, which profits were applied to the family expenditure, until the death of Beni Madho, the eldest son of Debi Din, on the 19th June 1876, when his father caused the name of Pem Kuar, the widow, and the name of Ganga Sahai, minor son of Bhima, another of Debi Din's sons, to be entered as proprietors of some villages, remaining himself in possession: that upon this followed disputes, and separate living, dating from the 16th October 1877, when the cause of action accrued: and that as all the property had been acquired while the family was joint, the plaintiff was entitled to a decree for one half of the entirety.

The defence of the defendant, Debi Din, mainly was that about ten years after the death of their father, which had occurred as the plaintiff stated, the brothers separated, each taking his half share; and that no part of the property in suit had been acquired by means of the ancestral stock or its profits, but by his, Debi Din's, own personal exertions, each brother carrying on business separately.

The Subordinate Judge found that Jian having died at the date alleged, left the property stated, and that plaintiff was in undisputed possession of a moiety thereof: but that after Nayan's separation, admitted by both parties to have occurred about thirty-eight years before this suit, the family no longer remained joint; "and although there was no division of the ancestral property by metes and bounds, the members separately appropriated and enjoyed the pro-

fits they carried on business separately, and all their concerns were separate; each party having exclusive possession of the property personally acquired by him; and the interest of any party in any transaction in which he was admitted as a partner, was limited to the amount of money contributed by him."

The Subordinate Judge also found that the plaintiff was at one time employed as a jamadar in the opium factory at Bibiapur, and subsequently traded in grain; and that he made smaller profits than did his elder brother, who traded in cotton and indigo seed, and who carried on business at Cawnpur with the late Mr. Hugh Maxwell, an indigo-planter, through whom he made a large fortune.

The lower Court observed: "Moreover, it is neither alleged nor proved that the plaintiff shared in the profits of the estates held in mortgage or purchased in the name of the first defendant or his children within twelve years before his cause of action, while it is shown that he received profits of mauza Gauri and Musahibpur held by him exclusively and of a 4-anna share in Asalatganj and Bachitbhartu in which, besides Beni Madho, other parties unconnected with the family were shareholders. As the plaintiff used to receive no profits from those estates in which the names of the second and fourth defendants were substituted in the place of Beni Madho's it did not affect his position, and if the plaintiff's possession was not affected by these paper proceedings he could have no cause of action.'

"Moreover, from the very fact of the plaintiff having in a former suit sued for possession of the property acquired in the name of first defendant and his children, it is shown that he did not hold joint possession of those properties on the date of his cause of action (16th October 1877), for had he been in possession, he would have sued merely for establishment of his right and maintenance of his possession as an equal sharer, and as he has not in the present or former petition of plaint mentioned the date on, and circumstances under which he lost such possession, or was excluded from joint family property, his plaint does not disclose sufficient cause of action. The lower Court also found that the suit was barred by

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limitation, observing: "The plaintiff has not proved that the property acquired in the name of the first defendant and his children was joint family property in the profits of which he participated within twelve years before his cause of action. The suit is therefore barred by lapse of time." The suit was dismissed.

On the plaintiff's appeal, the High Court, after a remand for further evidence on the point whether Debi Din had been either personally, or by authority given by him to sign khewats, a party thereto, maintained the judgment of the Court of first instance. The Judges (BRODHURST and TYRRELL, JJ.) pointed out that there was no evidence of jointness afforded by the revenue records, or that the plaintiff had ever interfered in villages bought in the names of the defendants, or conversely; and that, had it been otherwise, it would have been easy for the plaintiff to produce accounts, or other similar evidence, to show payments made by him to the defendants, or by them to him, for these estates. Nayan and the separated members of the family occupied the same building after their undeniable separation for some years, and that partition was not more formal, or more certain in its character, than this partition alleged by the defendants; and yet it was a fact.

The Judges then concluded in the terms quoted in their Lordship's judgment, concurring in the finding of the Court below.

They added the following to the finding of the fact of previous partition, on which their Lordship's judgment proceeded:—

"We think that the Subordinate Judge has rightly found that the parties to the suit have realized and appropriated the rents, and have continuously been in adverse proprietary possession of the properties purchased in their respective names, and that the plaintiff has not, within twelve years of the institution of his suit, been in possession of the properties which he sues to obtain.

Umrao Singh having preferred the present appeal, was now represented by Rameharan, his son.

Mr. C. W. Arathoon, for the appellant, argued that the burden of proof had been wrongly laid in this case upon the plaintiff, it having

been incumbent on the defendants to establish the separation alleged by them, so as to rebut the presumption of Hindu law that the family had continued to be joint. The defendants had not proved their case. He referred to the application of the presumption in particular cases, citing *Bholanath Mahta* v. *Ajudhia Persad Sookul*, (1), and *Gobind Chunder Mookerjee* v. *Doorga Persad* Baboo (2).

The respondents did not appear. Their Lordship's judgment was delivered by Sir R. Couch.

SIR R. COUCH.—THE plaintiff in this suit, the late Umrao Singh, who is now represented by the appellant, and the defendant, Debi Din, are the sons of one Jian, who had a brother named Nayan. The plaintiff asked in his plaint for a partition of the property, which he alleged was joint family property, part of it having come to the brothers from their father Jian, and another part of it having been acquired after the death of the father, and in such a manner as to be joint family property. The defence was that there had been a partition subsequently to the death of Jian. There had been a previous partition between Jian and his brother of the property which came to them from their father, but that is not material. The real question was, whether there had been a partition between the plaintiff and the defendant, Debi Din. The issue was: "Did plaintiff and first defendant separate after the demise of their father, or did they continue to live in joint partnership until 16th October 1877, and hold joint possession of all ancestral property, or was the property acquired with the ancestral stock while they lived as members of a joint family?" The Subordinate Judge in his judgment says: "From the evidence of the defendants' witnesses, and the tenor of the letters of the parties produced in this case, it is shown that the parties had separate concerns, and each received the profit due to his share in respect to the villages in which his own or his son's name was recorded as proprietor or mortgagee, separately, and for his exclusive use." This is a finding that, as alleged by the defendants, there had been a separation, and that each

(1) 12 B. L. R., 336. (2) 14 B. L. R., 337.

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of the parties, although no separation had been made by metes and bounds, had had separate enjoyment of his share of the property. When the case came before the High Court on appeal the finding of the High Court on the question was: "Having very carefully considered the evidence and the arguments of the learned counsel and pleaders on either side, we have arrived at the conclusion that no sufficient reason for disturbing the Judgment of the able and experienced Subordinate Judge has been shown; on the contrary, we agree with the lower Court that it is proved that the ancestral property was but of small value; that the two brothers made a partition of their ancestral property though they continued to live under the same roof; that Debi Din engaged in business on a much larger scale than did Umrao, who was in the service of the Government as a jamadar in the Opium Department; that the two brothers sometimes made purchases separately and sometimes jointly with their children or with strangers, but in all joint transactions the interest of each purchaser was limited to the amount contributed by him." This again is a definite finding that a partition had been made between the two brothers. It has been contended on the part of the appellant that the onus of proof had been improperly put upon the plaintiff to show that the family was joint. It does not appear from the judgments that the onus was so put upon the plaintiff. The case was fully gone into; the evidence offered by either party was received, and the whole of it was considered by both the lower Courts. It is not shown in any way that there has been any error in law in putting the onus of proof upon the plaintiff. There are two concurrent judgments of the lower Courts upon the question of fact, and there is no ground for the present appeal.

Their Lordships will therefore humbly advise Her Majesty to affirm the judgment of the High Court and to dismiss the appeal. As the respondent does not appear there will be no order as to costs.

Appeal dismissed.

Solicitors for the appellant:—*Messrs. T. L. Wilson and Co.*

FULL BENCH.

1891
February

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Mahmood and Mr. Justice Young.

QUEEN-EMPRESS v. POHPI AND OTHERS.

Criminal appeal—Appeal preferred by appellant in jail—Power of appellate Court to dispose of appeal in absence of the appellant—Criminal Procedure Code, ss 420, 421, 422, 423.

Where an appeal, preferred under s. 420 of the Criminal Procedure Code, has been admitted by the appellate Court, and notice has been properly given under s 422, and the record of the case has been sent for and perused under s 423, the appellate Court is competent, under the last-mentioned section, to dispose of the appeal though the appellant is not present and is not represented by a pleader.

The only limitation placed by s. 423 on the powers of the appellate Court is that the Court, before disposing of the appeal, must peruse the record, and, if the appellant is present or is represented by a pleader, the appellant in person must be heard, or the pleader must be heard.

So *held* by the Full Bench, Mahmood, J, dissenting.

Held by Mahmood, J, *contra*, that the principles of *audi alteram partem* and *ubi jus ibi remedium* and the provisions of s 422 of the Code, as to notice of appeal, imply that, where an appeal is admitted and not summarily rejected under s 421, the appellant must have a real opportunity of being heard; that in the passage in s 423 "after perusing the record and hearing the appellant or his pleader if he appears," the word "he" refers to the pleader, and must not be read as "either of them;" that, in any case, the words "if he appears" make it a condition precedent to the disposal of an appeal under the section that the appellant is heard, or at least has the choice of appearing; that the word "appears" refers to the *personal* appearance of the appellant; and that an appeal which has been admitted cannot be disposed of unless the appellant is before the appellate Court, or can be heard within the meaning of s 423.

Semble, per Mahmood, J, but the High Court in appeal is competent to send for a criminal to appear before it to explain a difficulty in his case.

These were five criminal appeals in which a reference to the Full Bench was made by Edge, C. J., on the recommendation of Mahmood, J. The appeals were presented by the appellants, who were in jail, on the 30th June 1890, under s. 420 of the Criminal Procedure Code, and was duly forwarded to the High Court by the officer in charge of the jail. The appeals were admitted by an order of Brodhurst, J., dated the 15th July 1890; the date fixed for

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their hearing was the 5th August 1890; and notices under s. 422 of the Code were duly served on the prisoners on the 23rd July. On the 18th October 1890, the appeals came on for hearing before Mahmood, J., who, on the 25th October, recorded an order directing that they should be laid before the Chief Justice, with a recommendation that the following question should be referred to the Full Bench :—

"Can an appellant who is in jail, and who has presented his appeal through the officer in charge of the jail in which he is confined, be said not to appear, so that he may be heard, within s. 423 of the Criminal Procedure Code, when by reason of his confinement in jail he cannot appear, and is without means to instruct a pleader to appear for him?"

This question was, by an order of Edge, C. J., passed on the 25th October 1890, referred to the Full Bench, and on the 28th October it came on for hearing.

Mr. W. K. Porter, at the request of Mahmood, J., appeared for the appellants.

Mr. C. H. Hill, as *amicus curiæ*, *contra*.

MAHMOOD, J.—This case represents five appeals, and under the present system of registering them, these 5 appeals are called as one appeal. There are five appellants and their names are Pohpi, Chidda, Mulua, Dammar and Sipahi.

These names I mentioned in my order of the 18th instant, as persons who at that time seemed to me to be entitled to be heard, that is to say, heard by me sitting here as the vacation Judge in charge of the duties which that office imposed upon me. When the case was called on for hearing, I saw from the record which was before me, that, although this appeal was denominated as one appeal, it in fact comprised five appeals, and further, although the Crown was represented before me, not one of these five appellants was represented. I also had the fact before me that the sentences from which these five persons were appealing were sentences of rigorous

imprisonment for 10 years each on an offence which according to law is non-bailable, that is to say, in the natural course of things no opening was given them by the law for releasing themselves by furnishing bail. It has always been an important question and doubts have been raised whether in regard to that class of offences called non-bailable there is any power in any Court—certainly not, as I feel, in the district authorities—to release a person on bail. It was even doubtful as to the powers of this Court, as the highest Court in these provinces, to release a person on bail, though I need entertain no doubt on that point now, but I am quite certain that these prisoners could not have been released by any other authority on bail than this Court.

I have made these observations in order to render it intelligible why the doubt arose in my mind, as described in my order of the 18th instant, and again repeated in the order of reference laid before the learned Chief Justice, as to whether the matter should go to the whole Court; because up to the 18th of this month I had ample reasons to think that these persons were prisoners confined in jail, and confined in a fashion in which their legs were tied down by iron chains, not metaphorical iron chains, but solid, actual iron fetters. I then felt it was right to ask Mr. *Datti Lal*, who was holding the brief of Mr. *Ram Prasad*, to consider whether or not I could proceed with the appeals. It was by reason of my order of reference of the 25th October 1890, that this case was laid before the learned Chief Justice for orders whether it should be heard by the Full Bench, and his lordship was pleased to say that it was to be heard by the whole Court, that is to say, all the Judges of the Court who were in Allahabad at that day, *i.e.*, to-day.

The case has thus come up before the whole Court, and I think, speaking entirely for myself, that I am obliged, not only to Mr. *Porter*, who at my request has appeared on behalf of the absentee prisoners, but also to Mr. *Hill*, who has been good enough to act as *amicus curiæ*, he not being at present the Public Prosecutor in charge of the business owing to some arrangement arrived at by the Government in his absence.

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I mention this on purpose, that purpose being that in this case ample opportunity has been given to legal talent to place matters before us, who, after all, are bound by the statute to make it easy for us to understand the difficulty which arose on the one side and the other.

With all that advantage it has been to me a matter of sorrow that it should be my duty to begin judgment in this case: that sorrow arises from the fact of my being the dissentient Judge. The reason why I have expressly mentioned this is that I am afraid I must take longer time than otherwise I would have considered necessary to deliver what I have to say.

I take it to be the unshaken doctrine of human jurisprudence, as distinguished from local jurisprudence, that whenever there are quarrels between two parties and those quarrels have to be decided, those quarrels cannot go before a person who is a party to them or in any way personally interested therein. The maxim, *Nemo debet esse judex in propriâ suâ causâ* (no man can be judge in his own cause), is a firm and sound maxim and it rests, not upon any suspicion as to the honesty of the judge or his capacity for the purposes of adjudication, but it rests upon a thing higher than the technicalities of law. It rests upon the philosophy that says that human beings are after all human beings, and, with all honour due to the honesty and integrity of judges, they are not to hear cases in which they are themselves concerned.

Now cognate with this is another doctrine which I again call a maxim of human jurisprudence, as distinguished from local or sectarian jurisprudence, and that doctrine is that adjudication must be made in open Court. Such was not the case at some period of English history, because we all know what the Star Chamber meant, and we also know that that Star Chamber might have done justice n many cases, but nevertheless it was abolished by the English when the nation came to find it necessary to do so for securing ustice.

I am not dealing with history and need not refer to that matter arther than for the purpose of this very case. I maintain, therefore,

that the opinion which I have already mentioned above should be applicable also to a matter entirely legal, entirely technical and entirely within the region of law, as distinguished from philosophy; but it is not so distinguishable as at first sight it may seem. There is another maxim which says *Audi alteram partem*—the meaning of which is that no one shall be condemned unheard. So at least says Mr. Broom in his celebrated work on legal maxims. Also there is equally as great an authority, if indeed not greater in point of jurisprudence than the authority of that maxim, and it is the saying of Seneca. It is this:—"*Quicunque aliquid statuerit parte inauditâ alterâ—Aquum licet statuerit, haud æquus fuerit.*" This translated in simple English means, "Whoever may have decided anything, the other side remaining unheard, granted that his decision may have been just, will not have been just himself."

This is not only poetry but it is sound juristic sense, and I think it is the essence of this doctrine which has passed into a maxim, *viz.*, *Audi alteram partem*.

Be that so or not, I know this, speaking entirely for myself again, that it is to me impossible to conceive that any one, no matter how able and conscientious he may be, can with certainty undertake to say that he has arrived at right results in adjudicating upon a quarrel without giving both parties ample and equal opportunities of being heard.

That this is my conviction is not entirely the result of what little I have learned of the English law, but it is the result of the study of Muhammadan jurisprudence also, to which I shall have to call attention, because that jurisprudence was the standing law of the land when the British rule came to this part of the country. This case is from the district of Budaun, a territory ceded to the Honorable the East India Company by the Nawab Wazir of Oudh by the Treaty of the 10th November 1801 (*Vide* Aitchison's Treaties, Vol. II, p. 100). That is to say, at the date of the cession the law in criminal cases was the Muhammadan law both substantive and adjective, and, it goes without saying, as a matter of international

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law, that when this annexation or cession of territory took place, the British rule took it subject to that law. That law requires that the litigants should be heard before their cases are decided.

Under these conditions it is of course obvious that, unless there was express legislative sanction given by the sovereign authority to whom this territory had been ceded changing the old law, such old law would stand unchanged, because such is the notion of all civilized nations dealing with each other, especially in questions of cessions of territory.

I have gone the length of reading out, but I think with full authority, a couplet of Seneca. It has been cited at least half a dozen times by eminent Judges in England, and I am glad to be able to follow them in this method; because I want to show that in India, too, poets, more modern no doubt than Seneca, have spoken out in the same fashion. One is the following couplet—

قریب ھی یار روز محشر چھپیگا کشتوں کا خون کیونکر
جو چپ رھیگی زبان خنجر لہو پکاریگا آستین کا

I will render this into English because in principle it represents exactly the same idea as that of Seneca, and it is of greatest practical importance inasmuch as it represents the feelings of a native of India.

The couplet may be thus rendered into English :—

"O friend the day of judgment is near; how then will it be possible to conceal (by silence) the blood of those killed? Even if the tongue of the dagger will keep silence, the blood on the sleeve will speak out."

This is certainly as good jurisprudence as the lines of Seneca which I have read out. What does it mean? It means that the hearing of the litigant is absolutely necessary, and if he is not heard there is no adjudication and no justice, and the only justice to be got will lie in the day of judgment.

Having so far dwelt upon this aspect of the case, I think it is important for me now to examine in detail the provisions of the

enactment regulating criminal appeals. I have intentionally dwelt so long on this part of the case, because I want to show that I take it, unless the contrary is demonstrated, as an undoubted proposition of our law, irrespective of statute and irrespective of any considerations other than the fundamental principles of jurisprudence, that whenever right is given to any party for purposes of putting forth his case, thereby it is necessarily implied that he must be heard. In other words, whenever the doctrine, *ubi jus ibi remedium* applies, I must take it that when a man asserts a right he must be heard, because remedy itself implies the right and the claim to be heard in order to show to the Judge that there is a remedy to be awarded to the suitor.

At first sight it would appear that this is a matter entirely concerned with the interest which I take in such principles, and that it is on that account that the question has been referred to the whole Court. But it is not so. I have before me seven cases, which I had to consider during the long vacation, in all of which this question was raised. The first case is that of Jarbandhan, which is a revision under s. 439, Criminal Procedure Code, in which the solitary ground inviting the interference of this Court was as follows :—

"That the Deputy Magistrate convicted the petitioner on the basis of fictitious proceedings taken by the Police, and the Sessions Judge dismissed his appeal without instituting inquiry and without summoning and examining him, the petitioner, and therefore the petitioner prays that justice be done to his cause." The other six cases also contain similar grounds, and I felt that, if it was true that these persons had never been summoned to argue their appeals before the Sessions Judge, it might be very doubtful whether the disposal of the appeal was or was not legal. In order to decide whether it was legal, I must, after what I have already stated as to the general doctrine of law and the effect of *Audi alteram partem*, proceed to look at the Act itself.

This enactment is called the Code of Criminal Procedure, Act X of 1882. I know that it was preceded by at least two previous enactments, one being the Criminal Procedure Code of 1861, in

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which s. 419 is interesting for the purposes of the question raised. The other Act was the Criminal Procedure Code of 1872, of which s. 280 is interesting, because it follows out the same line of thought as s. 419 of the Act of 1861. More important than either of these for the purposes of this case is s. 423 of the Code of Criminal Procedure, Act X of 1882.

Now in order to understand s. 423 of the Criminal Procedure Code, and only for that purpose, I find it necessary to refer to some other sections of this very Code, to enable me to place the interpretation which I shall place upon s. 423, the most important section with reference to this case.

The first among these to which I wish to invite attention is s. 404 of that same Code, which defines what all know to be the well known rule of law that "no appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code, or by any other law for the time being in force." This stands there practically as a warning rather than as a necessity.

The next section is 410. It says:—"Any person convicted on a trial held by a Sessions Judge or an Additional or a Joint Sessions Judge may appeal to the High Court." There in the section the word "may" occurs, but in the learned argument with which Mr. *Hill* has favoured us, he did fully concede that this word "may," as distinguished from "shall," does not make any practical difference, because the learned counsel agreed that it did give a right of appeal as distinguished from an indulgence to be heard or not to be heard. Then comes s. 419 of that same enactment which lays down the manner in which a petition is to be written out, because the section says:—"Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under s. 367." Then comes s. 420, which says:—"If the appellant is in jail he may present his petition of appeal and the copies accompanying the same to the officer

in charge of the jail, who shall thereupon forward such petition and copies to the proper appellate Court.

I must here pause for a second in order to indicate what I do believe to be the right interpretation of s. 419. S. 419 prescribes the form of the petition as distinguished from s. 420, which prescribes the manner in which, in the exceptional case of a prisoner in jail, the petition of appeal is to be presented. These are two different matters altogether, and these sections are not in *pari materiâ*. I say so, because, having considered it, I look upon s. 420 to be nothing derogatory to the rule laid down in s. 419. S. 419 applies as much to a prisoner in jail as to any other appellant and that section requires that the petition shall be prepared in the form in which that section requires, while s. 420 is concerned only with the question of presentation of appeals from the jail.

Thus far I have simply indicated that rules about the method of presentation are not to be confounded either with the right of appeal or with the right that the appellant has to be heard. There are three things especially important in cases of persons who are never to be heard, whose tongue is silent, whose tongue cannot speak to us, because *ex hypothesi*, by exigencies of this very Code, it is impossible for their tongue to speak to us.

Then we come to s. 421, of the Code of Criminal Procedure, which prescribes, not any rule as to the drawing up of petitions, nor any rule how they are to be presented, but how they are to be disposed of, if the appellate Court saw this fit. This section provides that "on receiving the petition and copy under s. 419, or s. 420, the appellate Court shall peruse the same, and, if it considers that there is no sufficient ground for interfering, it may reject the appeal summarily. Provided that no appeal presented under s. 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same. Before rejecting an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so."

I had some difficulty in understanding the proviso in this section, but that difficulty has been removed by the learned argu-

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ment addressed to us by Mr. *Hill*. It must, on the maxim of interpretation *expressio unius est exclusio alterius*, I am afraid, be taken that this proviso is limited to appeals which have not been presented from the jail, and therefore a man in jail, whilst on the one hand he has the privilege of presenting his appeal in the manner which s. 420 prescribes, on the other hand he has not the privilege of insisting that he should be heard, or even his pleader, if he retains one, after sending up an appeal from the jail.

I have no doubt that, for purposes of summary rejection of appeals, this proviso to s. 421 is helpful to the cause which Mr. *Hill* has undertaken to advocate, namely, that the presence of the prisoner appellant is not necessary as a condition precedent to the action of the Court in rejecting such appeals summarily. I do not wish however to dwell upon this aspect of the case, nor upon the somewhat invidious distinction which the Legislature in its wisdom has thus thought fit to draw. I do not do so because these five appeals were not summarily rejected.

They were admitted by my brother Brodhurst; they are standing appeals on the register of this Court, and they cannot be disposed of except according to the method of procedure which this enactment prescribes.

This brings me directly to the point before us, and I wish first of all to read s. 422 of the Criminal Procedure Code. It says:—"If the appellate Court does not reject the appeal summarily it shall cause notice to be given to the appellant or his pleader, and to such officer as the Local Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer furnish him with a copy of the grounds of appeal; and in cases of appeals under s. 417, the appellate Court shall cause a like notice to be given to the accused."

Now over the word "notice" there may in some cases be difficulties of interpretation, but that difficulty I do not feel in this case, because, "notice" is a well understood term of law. What does the word mean? I will interpret it. *Notice* is the warning to a

party to a *lis* to enable him to resist a possible result, that is to say, not merely information that that which is threatened will, or may possibly, happen in a matter in which he, the person to whom notice is given, is concerned, but also that he can avoid such result if he takes proper measures to do so. I have put the thing so generally because this explanation of the word "notice" is ample enough to cover cases arising out of Common law or Chancery law or the Criminal law, and indeed all departments of law.

This being so, never has it been possible for me to be other than unwilling to credit the Legislature with surplusage, or with laying down things that it did not mean or using words which had no purpose in them. Here I have got to deal with the word "notice" and the object of its being used with the specification of "time and place at which such appeal will be heard." Did the Legislature intend by using these words that the person to whom such notice was to be given was to be tied by the leg by actual iron chains so as to disable him from avoiding the result, namely, the dismissal of his appeal, and yet give him notice. I cannot hold any such thing. I find it impossible to do so, for then s. 422 would never have existed, for the whole section in most cases would have been a surplusage. The last part of that section also leads to the same conclusion, because there the case contemplated is an appeal presented not by the prisoner but by the Crown, under the special powers given to it by s. 417, against a verdict of acquittal. There also the word "notice" occurs. We hear *not* of the pleader of the accused, but we find him mentioned only as the person to whom notice is to be given. We also have to look at s. 427, which prescribes that when an appeal is presented under s. 417, the High Court may issue a warrant directing that the accused be arrested and brought before it or any Subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal or admit him to bail."

I am particularly anxious to call attention to this provision of the law, because, by dint of this power which I have, I may make it impossible for the appellant before me to avail himself of the

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notice as it is understood by me and as I have described it. For example I may, *ex hypothesi*, first take very good care to imprison the person far away from any Court house, and then to give the notice required by the last part of s. 422. What would be the use of such "notice" if it meant other than what I have said?

However, the matter does not really rest so much on the analogy of this section as it does upon the interpretation to be placed upon s. 423 itself. That section I feel it difficult to interpret in the manner in which Mr. *Hill* desires to interpret it, and that difficulty arises mostly on account of the fact that English is not my tongue. I take it to be a rule of law, as distinguished from anything connected with philology, that a sentence is to be read in the grammatical sense, that is to say, such grammar as is known to the authority which has to deal with the interpretation of the statute. I have read the first part of the section, which is important. It runs thus:—"The appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under s. 417, the accused, if he appears, the Court may, if it considers there is no sufficient ground for interfering, dismiss the appeal, or may—" and here follow four clauses which are not important for the purposes of this discussion, otherwise than indicating what enormous powers the Court has as a Court of appeal.

The difficulty which I have had so far as the interpretation is concerned consists in the second sentence of the first paragraph of the section which I have read:—"*After perusing such record;*" every one will agree that that is a condition precedent to a dismissal of an appeal. "*And hearing the appellant or his pleader, if he appears.*" We have been asked by Mr. *Hill* to hold that the pronoun, "*he*" as it occurs there, by dint of nothing other than a comma, should be read to mean, "*either of them.*" In other words, the learned counsel has argued, and I have listened to his argument with much attention, that the phrase "*after perusing such record and hearing the appellant or his pleader, if he appears*" means that the

word "*he*" there is alternatively used because the word "*or*" is disjunctively used, and is a disjunctive conjunction. There may be difficulties, purely as a matter of interpretation, over the word "*or*" whether it always means that; but I cannot take it that the word "*he*" there means "*either of them.*" The Legislature could have easily made that clear if they meant "*either of them;*" but "*he*" never means "*either of them.*" According to the general rule of interpretation, the pronoun must refer to the substantive nearest to it, and therefore the word "*he*" must be taken to refer to the word nearest to it, *viz.*, "*pleader.*"

This, however, is not the only important matter to me, because I will, for the sake of argument, concede that "*he*" means, *either of them*, and read the statute thus "after perusing such record and hearing the appellant or his pleader *if either of them* appears, &c."

Reading the section thus my difficulty becomes greater, because I have got to deal then with the word "*if.*" What is the meaning of the word "*if.*" If I remember rightly "*if*" is only one of the paradigms of the English word to "*give,*" the which word only means "*granted,*" and "granted" means a "*condition precedent,*" a very much bigger phrase. Therefore, reading it in this light, we have this, "*granted that he appears,*" namely, that this must necessarily be a condition precedent for the disposal of the appeal, that either the appellant is heard or at least choice is given to him to appear. If the word "*if*" did not mean choice, it is a valueless word It is no use tying a person by the leg, making it impossible for him to appear, and then saying to him we are to hear you "*if*" you appear, when all the while we know that we have made his appearance impossible.

The next word to be interpreted is the word "*appears.*" The word "*appears*" implies the possibility of the person's presence in Court, or any such presence which is contemplated by rules of procedure and recognised as equivalent to appearing in person.

It is to me a matter more or less of surprise, that whilst in the Code of Civil Procedure (Act XIV of 1882) s. 36, there are specific

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rules laid down prescribing that the appearance of the parties may be either in person or by pleader, no such general rule exists throughout the whole of this Code of Criminal Procedure. Therefore the word "*appears*," as it occurs in s. 423 of the Code of Criminal Procedure must mean that the man accused or the prisoner must appear *himself*, and I can well understand it, because there is internal evidence that the law did so intend. If the word "*appears*," had any other meaning there would have been no necessity of referring to "*his pleader*," for it would have been equally enough to say; "after perusing such record, and hearing the appellant, if he appears, &c."

The powers which the Court of appeal in Criminal cases possesses are depicted in this very section, and I need not read it. The clauses (*a*), (*b*), (*c*) and (*d*) show the enormous powers which the Courts of appeal possess in regard to conviction. Fortunately those powers do not include the power of enhancing sentence, a matter which did at one time form the subject of legislative enactment in Act X of 1872, but still even *minus* that power, the powers of the appellate Court are very vast, and undoubtedly in a case when the appellate Court happens to be this Court, because this Court is also a Court of revision under s. 439 of the Code of Criminal Procedure.

Before I pass on to the revisional powers of this Court, which I consider wholly relevant by analogy to this point, I must refer to s. 424 only for the purpose of deriving the rule as to my interpretation of the previous section. This section says in the first part, "the rules contained in Chapter XXVI. as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any appellate Court other than a High Court," then comes the proviso, "Provided that unless the appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered."

I mention the proviso, because it shows that this proviso would have been an absolute surplusage, wholly unnecessary, unless, upon general principles, the contemplation of the law was that the accused should be present to hear the judgment.

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In passing on then to s. 439 of the Code of Criminal Procedure, I find that it is important to refer to the second paragraph of it :—

"No order under this section shall be made to the prejudice of the accused unless he has had an opportunity of being heard either personally or by pleader in his own defence."

In the course of consultation which I have had the honour of having with the learned Chief Justice and my brother Judges, some difficulty arose in my opinion as to the meaning of the word "*prejudice.*" However, putting that aside, one thing is certain, that we cannot enhance punishment by dint of s. 439, unless we give the accused an opportunity of being heard, either personally or by pleader.

Now the practice of this Court in these cases, called "*Nemo* cases," has been, I know, different from the view of the law which I have now taken; but the reason of that, I believe, is that "*Mr. Nemo*" never appeared in person and never raised the question which has given rise to the present difficulty. There must be some kind of appearance, either in person or by pleader, before any powers under s. 439 can be exercised to the prejudice of the prisoner. I am anxious, in order to fortify what I have just said as to s. 439, to read the exception contained in s. 440: "No party has any right to be heard, either personally or by pleader, before any Court when exercising its powers of revision; provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect s. 439, paragraph 2."

Two points are to be deduced from this section. First the object of enacting this section would have been wholly unnecessary unless this statute proceeded upon the well recognised doctrine of law, that wherever there is a right to have a *lis* there is an implied right to be heard, and that this section makes an exception to the general rule. This is a case of *expressio unius est exclusio alterius.*

Then comes the proviso, which is equally important, because it shows that even though an application for revision may be disposed

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of in the absence of the applicant without hearing him, we are not so to dispose of them as to "*prejudice*" the accused within the meaning of the second paragraph of s. 439.

Having so far dealt with these aspects of the case, as they have appeared to me both in point of law and upon points which I think have even higher basis than that doubtful phrase, I think it is necessary for me to say that, if it is true that the law of British India makes it possible for me sitting here as a Judge, in the first place, by dint of my writ to order a person to be imprisoned and tied by a chain, then in the next place to require the mockery of giving him notice, the mockery of asking him to attend, when I, by dint of the exercise of my own power have made it impossible for him to attend, and then have the solemn mockery of having his name called out; if this is the law of British India, I hope the sooner it is abrogated the better.

I am of opinion that we cannot proceed to hear this case, unless the prisoners are before us, or can be heard within the meaning of s. 423 of the Criminal Procedure Code.

I wish just to add one observation, and that is this. There has been a doubt as to whether or not this Court can send for a criminal to appear before it to explain a difficulty in his case. I have no doubt that this Court has that power.

EDGE, C. J.—The only question which I propose to consider is whether these appeals can be disposed of in the absence of the appellants, who are not represented by a pleader. That question, it appears to me, depends on the construction of s. 423 of the present Code of Criminal Procedure (Act X of 1882). That section applies to cases in which appeals have been presented and admitted. As I understand, the contention is that in the case of an appeal which has been admitted, the appellate Court, notwithstanding that notice has been properly given under s. 422 of the Code, notwithstanding that the record of the case has been sent for and perused by the Court, is incompetent to dispose of the appeal, if the appellant, who is not represented by a pleader, is not present. I cannot construe s. 423 as providing any such limitation on the power

of the appellate Court. The limitation which it does provide, as I read the section, is that the appellate Court, before disposing of the appeal, must peruse the record, and if the appellant is present, or is represented by a pleader, the appellant in person or his pleader must be heard. The Legislature contemplated clearly that in certain cases a criminal appeal might be disposed of without hearing the appellant, or any one on his behalf. For I find under s. 421, the Court is empowered in the case of an appeal presented under s. 420 through the officer in charge of the jail, to summarily reject it, if on perusing the petition of appeal and the copy of the judgment or order, and, in a case tried by a jury, the copy of the heads of charge, it considers that there is no sufficient ground for interfering, and that without perusing the record of the case. Again in cases coming up in revision the Court is not bound to hear any party in person or by pleader, unless the Court proposes to make an order to the prejudice of the accused person. That I understand to be an order enhancing the sentence or altering a conviction against him to one involving a more serious sentence. I cannot conceive the meaning of ss. 439 and 440 is that a Court in revision has not power to reject the accused person's application for revision, unless that accused person or his pleader has actually been heard. My brother Mahmood apparently thinks that persons who have been convicted and have appealed are hardly treated, if their appeals are disposed of in their absence. He has suggested that the Code of Criminal Procedure cannot contemplate the disposal of an appeal without the hearing of the convicted person in person or by a pleader, when the convicted person is, by reason of the sentence which was passed upon him, prevented from personally attending. It must be observed that it is in the power of any convict, if he has means, to be represented before the appellate Court by a pleader. If he has not the means to instruct a pleader to represent him, he is not in any wise in a worse condition than a convict who has been released on bail, pending his appeal, and through want of means is unable to attend at the hearing of his appeal, or to instruct a pleader to represent him. It has been the practice of this Court since its foundation to dispose of these criminal appeals under s. 423

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and the corresponding sections of the previous Acts, although the appellant did not appear and was not represented by a pleader; the Court in all such cases having taken care that proper notices had been served under s. 122 of the present Code, or the corresponding sections of previous Codes, before disposing of such appeals.

I do not propose to express any opinion on the historical aspect of my brother Mahmood's judgment, or further than I have done on the other sections to which he has alluded. In my opinion the hearing of those appeals can proceed and they can be disposed of by the Court under s. 423 of the Code, although the appellants are not present and are not represented by pleaders.

STRAIGHT, J.—I am entirely of the same mind as the learned Chief Justice.

YOUNG, J.—I concur in the judgment of the learned Chief Justice, and in addition to the argument which he has set forth, I will remark that s. 426 of the Criminal Procedure Code provides a procedure by which the appellate Court may, for special reason, order that the execution of the sentence or order appealed against be suspended; and if the appellant is in confinement, that he be released on bail or on his own bond. Such special provision is provided for special circumstances only, and therefore is not generally applicable to all cases, seeing that in many cases (as in the case now under consideration) the appellant is in jail under a legal warrant, and cannot appear in any Court until such warrant is set aside, and such warrant can be set aside only under some special provision such as that referred to in the special cases to which s. 426, Criminal Procedure Code alludes. Similarly in s. 428, the law enacts that the accused or his pleader shall be present in the event of additional evidence being taken, unless the appellate Court otherwise directs. This special provision would not be necessary if, as a matter of course, the appellant were always to be present in Court during the hearing of his appeal.

[On the 6th February 1891, the appeals came on for hearing on the merits before Tyrrell, J., by whom they were dismissed.]

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

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KODAI SINGH (PLAINTIFF) *v.* JAISRI SINGH AND OTHERS (DEFENDANTS).

Appeal—Decree conditional upon payment of a certain sum within a specified time—Appeal presented after the expiration of the time so fixed.

The plaintiff in a pre-emption suit obtained a decree in his favour, conditional on payment into Court of a certain sum within a specified time; otherwise his suit was to stand dismissed. He did not comply with the terms of the decree, but, after the expiration of the term mentioned therein, appealed against it.

Held that the appeal would lie both in respect of the sum fixed by the decree to be paid by the plaintiff-appellant, and the discretion of the Court as regards the period allowed for payment.

THIS was a reference to the Full Bench made, on the recommendation of Mahmood, J., under the following circumstances :—

The appellant was plaintiff in a pre-emption suit and had obtained a decree (dated the 28th April 1887) in his favour in the Court of the Munsif of Gorakhpur, which decree provided that the plaintiff should be entitled to recover the property in suit on payment of the sum of Rs. 799 within 15 days from the date of decree. The defendants did not appeal, but the plaintiff appealed in respect of the amount fixed by the Court of first instance as the pre-emptive price, and he also complained that the time allowed for payment was too short. This appeal was presented on the 27th May 1887, and was on the 2nd February 1888 dismissed by the lower appellate Court without inquiry into the merits, that Court holding that, the term within which the money was to be paid under the decree of the first Court having expired, the plaintiff had no right of appeal. The plaintiff then appealed to the High Court.

STRAIGHT, J.—The learned Judge appears to have refused to enter into the question of price, because, the Rs. 799 not having been paid within the time directed by the decree of the first Court, he was of opinion that there was no subsisting decree from which an appeal could be preferred. Strictly speaking, the exact decree which stood at the date of the plaintiff's filing his appeal was that of dismissal of his suit by reason of his having failed to deposit the Rs. 799 within 15 days, and, had he appealed it on that footing,

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he might have raised questions as to the propriety of the first Court's finding on the matter of price and the time allowed him within which to pay the amount into Court. I think, therefore, in this case it must be taken that there was a decree from which an appeal could be entertained and the plaintiff was entitled to get a determination of the question of price, which, when decided, might properly guide the Judge's conclusions upon the further point as to whether the time allowed by the first Court was reasonable.

We in no way wish to depart from what was thrown out in the case of *Sheo Pershad Lal* v. *Thakoor Rai* (1) and followed by Pearson and Spankie, J.J., in *Parshadi Lal* v. *Ram Dial* (2) that an appellate Court in its discretion may vary the decree of a first Court in the matter of time for payment, even though such time expired before the appeal was filed.

The effect of this view upon the present appeal is that it will be decreed and the appeal be remanded to the Court of the Judge of Gorakhpur for restoration to his file of pending appeals and disposal in ordinary course as an appeal upon the pleas, including that of time, taken by the plaintiff-appellant. Costs hitherto incurred will follow the result.

MAHMOOD, J.—This case has arisen out of a reference made by me, and the circumstances which gave rise to the reference are stated in my order of reference dated the 28th May 1889, and I do not wish to repeat the circumstances of the case further than saying that my judgment in this case depends on, and refers to, that order and the facts stated therein for the consideration of the question of law which arises here. This being so, it is, I think, important for me specially, as the referring Judge in the case, to explain that my ruling in *Chhidda* v. *Imdad Husain* (3) is not inconsistent with the view expressed in the judgment which has just been delivered. That was not a case of a regular pre-emption decree, which was the subject of appeal, but the appeal related to the execution of such a

(1) N.-W. P. H. C Rep., 1868, 254. (2) I. L. R., 2 All., 744.
(3) Weekly Notes, 1888, p. 4.

decree which fixed one month as the time for payment of price. That decree had become final by being affirmed by the appellate Court on the 15th January 1885, without any alteration as to the term of one month, but the deposit of the purchase money was not made till the 16th February 1885, that is, after the fixed period of one month, even as calculated from the appellate decree of the 15th January 1885. The appellate Court in that case, in passing its decree of the 15th January 1885, had, no doubt, power to decline to extend the period, as was held by the Full Bench in *Sheo Pershad Lal* v. *Thakoor Rai* (1), to which I referred, and, as a Court executing a decree, declined either to hold that the decree, in fixing a period for payment of price, was illegal, or that the period of one month which it prescribed could be extended by the Court executing the decree. The argument that the period of one month should be calculated from the final appellate decree of the 15th January 1885, could not very well be pressed in that case (as indeed it was not pressed) in favour of the pre-emptor decree-holder, because, as I have already said, even upon that calculation his deposit of the price on the 16th February 1885 was beyond time. The case is therefore distinguishable from the present case.

The real difficulty in connection with pre-emption decrees, and specially with reference to the point which has given rise to this reference, arises in considering whether such decrees, which are usually passed, or which purport to be passed, under s. 214 of the Code of Civil Procedure are decrees in the nature of decrees *nisi* or decrees absolute in the same manner as in any other class of cases where the decrees may, by force of equity, be subjected to considerations and limitations of amount or time as to payment of money as a condition precedent to the recovery of possession, or subjected to other restrictions which the Court may deem fit to impose. This is a matter which I had to bear in mind in *Rup Chand* v. *Shamsh-ul Jehan* (2), and I dealt with the matter in a suit for pre-emption itself, dealing with it much upon the same principles as those governing other conditional decrees passed in suits where the possession of

(1) N.-W. P. H. C. Rep, 1868, p 254. (2) I. L R, 11 All, 346.

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immovable property is subjected to conditions. I think it is enough to say, in order not to delay or prolong my judgment, as I have already explained my ruling in *Chhidda* v. *Imdad Husain* (1) and the ruling in *Rup Chand* v. *Shamsh-ul-Jehan* (2) that no distinction of principle really exists, and it is only because the learned Judge of the lower appellate Court misapplied the former ruling that he considered the ruling relieved him of the duty of trying the suit upon the merits. I think the rule, which was laid down in *Rup Chand* v. *Shamsh-ul-Jehan* (3), is a rule which should govern this case, consistent as it is with the principle of the Calcutta Court ruling in *Noor Ali Chowdhuri* v. *Koni Meah* (4), and the Bombay Court ruling in *Daulat and Jagjivan* v. *Bhukandas Manek Chand* (5), to both of which I referred in the case. I am also glad that the conclusions arrived at in this case by me are wholly consistent with those arrived at in the judgment which has just been delivered. I therefore agree in the order which has been made in the case by my brother Straight.

EDGE, C. J.—In concurring with the judgment which has been delivered by my brother Straight, I should say that I understand that judgment to be in no way based upon any cases referred to in the judgment just delivered by my brother Mahmood. As to these cases and the inferences to be drawn from them I decline to express any opinion. I am of the same opinion as my brother Straight.

BRODHURST, J.—I concur with my brother Straight.

TYRRELL, J.—I also concur with my brother Straight, without expressing any opinion on the cases just referred to in his judgment by my brother Mahmood.

Appeal decreed.

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(1) Weekly Notes, 1888, p. 4.
(2) I. L. R., 11 All., 346.
(3) I. L. R., 11 All., 346.
(4) I. L. R., 13 Calc., 13.
(5) I. L. R., 11 Bom., 172.

APPELLATE CIVIL.

1890
April 24.

Before Mr Justice Straight and Mr. Justice Young.

RADHA PRASAD SINGH (PLAINTIFF) *v.* PERGASH RAI (DEFENDANT) *

Act XII of 1881 (*North-Western Provinces Rent Act*) *s.* 189—*Act XIV of* 1886, (*amending Act XII of* 1881) *s.* 5—"*Rent payable by the tenant*"—*Appeal.*

The words "rent payable by the tenant" in s. 189 of the North-Western Provinces Rent Act (XII of 1881) (as amended by Act XIV of 1886) mean the rate of rent payable by the tenant and not merely the actual amount of money which is due at any given time by the tenant to his landlord as rent.

The facts of this case sufficiently appear from the judgment of Straight, J.

Hon. G. T. *Spankie* and Pandit *Sundar Lal*, for the appellant.

Munshi *Kashi Prasad* and Munshi *Jwala Prasad*, for the respondent.

STRAIGHT, J.—This second appeal relates to a suit brought by the plaintiff-appellant against the defendant-respondent for arrears of rent amounting to Rs. 88-1-0, in respect of 1292, 1293 and 1294 Fasli. The case was heard by an Assistant Collector of the first class, and he decreed the claim in part upon the 26th August 1887. The only question before us is with regard to the language of s. 189 of the Rent Act, as it now stands, whether any appeal lay to the Court of the District Judge. The answer to this objection, if any can be found, is contained in s. 189. Now it is material to remember in considering this question that until 1886 the words "or in which the rent payable by the tenant has been a matter in issue and has been determined," were not in the rent law then in force, and that they were introduced in that year by s. 5 of Act XIV of 1886. It is contended by Pandit *Sundar Lal* that the words "rent payable by the tenant," mean the "*rate*" of rent payable by the tenant, and that the appeal which is here in express terms given by this section is an appeal limited to cases in which the Court of first instance has determined the rate at which a

* Second appeal No 756 of 1888 from a decree of G J Nicholls, Esq., District Judge of Gházipur, dated the 17th February 1888, modifying a decree of Maulvi Muhammad Wasi, Deputy Collector of Gházipur, dated the 26th August 1887.

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tenant is to pay rent. On the other side Mr. *Jwala Prasad* argues that these words give a general power of appeal and that in every case in which the "*amount*" of rent payable by a tenant comes into question, that tenant, if unsuccessful, has a right of appeal to the Judge. I cannot accept this view. It seems to me that if the Legislature had intended to throw open the door indiscriminately to appeals of that description it would have been not merely inartistic drafting but surplusage to add these amending words, when the section might have been framed in such a way as to give a right of appeal, irrespective of any question of amount or value. I think significance is to be attached to the words "has been a matter in issue and has been determined," because that would cover a case in which, though the amount claimed by a landholder was below the sum of Rs. 100, yet, if the rate of rent was in issue in that suit between himself and his tenant, and the rate of rent had been determined in that suit by a Court of first instance, there would be an appeal. It seems to me clear that according to the language of s. 189 the only instances in which an appeal lies to the District Judge are the following. (1). Where the amount or value of the subject matter exceeds Rs. 100. (2). Where the rent payable by a tenant has been a matter in issue and has been determined, and, lastly, where the proprietary title to land has been determined between parties making conflicting claims thereto. All these matters may well be made the subject of an appeal to the District Judge as involving important considerations; the question as to the rate of rent being one which would, as between the landlord and the tenant, as a matter of *res judicata*, bind them as to the rate of rent payable by the one to the other for all subsequent time. By this, of course, I mean until an alteration made by agreement between the parties or by the act of a Court properly empowered under the statute has taken place. I do not think, as at present advised, that the amendment was intended to flood the Courts of District Judges with appeals on pure questions of the amount of money in the shape of rent due from a tenant to his landlord. This being the view that I take of the matter, I am of opinion that no appeal lay from the Assistant Collector's decision to the District Judge, and that this

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appeal must be decreed, and, the decree of the District Judge being set aside, that of the Assistant Collector must be restored, with costs to the successful party in proportion to his success in all Courts.

Appeal decreed.

YOUNG, J.—I concur.

[A similar interpretation was placed upon the above-mentioned section of the N.-W. P. Rent Act by Edge, C. J., and Brodhurst, J., in the case of *Bhagwan Din* v. *Mosai*, Second Appeal, No. 431 of 1888, decided on the 4th February 1890—W. K. P.]

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Brodhurst.

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June 27.

ANANDI RAM AND OTHERS (PLAINTIFFS) *v.* DUR NAJAF ALI BEGUM (DEFENDANT)*

Mortgage—Payment of Government revenue by mortgagees in possession to save the property—Payment of mortgage-money into Court by mortgagors and relinquishment of possession by mortgagees—Subsequent suit by mortgagees to recover the Government revenue paid by them by sale of the mortgaged property—Act IV of 1882 (*Transfer of Property Act*) *s.* 83.

The plaintiffs were mortgagees in possession of certain shares in a village under a mortgage which, as to the principal amount advanced, was a simple mortgage, as to the interest a usufructuary mortgage The mortgagees, to save the property from sale, paid up certain arrears of Government revenue. Subsequently, the defendant, who was the representative of the mortgagors, under s 83 of the Transfer of Property Act (IV of 1882), paid the original sum due under the mortgage into Court. The mortgagees withdrew the money so paid in and deposited the mortgage-deed in Court. The mortgagees then, after relinquishing possession of the mortgaged property, sued to recover the money which they had paid as Government revenue by sale of the mortgaged property.

Held that though the mortgagees might originally have treated the amount paid by them as Government revenue as part of the mortgage-money, they did not by such payment obtain a lien independently of their position as mortgagees, and when once they had abandoned their lien on the mortgaged property by accepting the money paid into Court by the mortgagors and by relinquishing possession of the mortgaged property, they could not afterwards revive it; and their suit, which was for realization of the Government revenue paid by them, by sale of the mortgaged property, must fail.

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* Second Appeal No 1266 from a decree of T R. Redfern, Esq., District Judge of Bareilly, dated the 1st May 1888, reversing the decree of Maulvi Abdul Kayyum, Subordinate Judge of Bareilly, dated the 15th November 1887.

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Semble, a mortgagee, who had given up his lien under circumstances similar to those above described, might bring a simple money suit to recover money paid by him to save the property from sale in execution for arrears of Government revenue.

Kinu Ram Das v. *Mozaffer Hosain Shaha* (1); *Lachman Singh* v. *Salig Ram* (2); *Achut Ramchandra Pai* v. *Hari Kamti* (3); *Girdhar Lal* v. *Bhola Nath* (4); *Parsotam Das* v. *Jaijit Singh* (5); *Nikka Mal* v. *Sulaiman Shaikh Gardner* (6); *Kristo Mohinee Dossee* v. *Kaliprosono Ghose* (7); and *Nugenderchunder Ghose* v. *Sreemutty Kaminee Dossee* (8) referred to.

The facts of this case are fully stated in the judgment of the Court.

Mr. *Roshan Lal* and Bábu *Durga Charan Banerji*, for the appellants.

Munshi *Madko Prasad* and Mir *Zahur Husain*, for the respondent.

EDGE, C. J., and BRODHURST, J.—The suit out of which this appeal has arisen was one in which the plaintiffs sought a decree for sale against certain shares in a village under the following circumstances. The plaintiffs were mortgagees of the shares in question. The mortgage was a simple mortgage, so far as the principal was concerned, and a usufructuary mortgage so far as the interest on the principal moneys lent was concerned. The plaintiffs, whilst they were in possession as usufructuary mortgagees, paid certain arrears of the Government revenue due in respect of those shares. It may be taken that those payments were made to protect the mortgaged property from sale under s. 166, of Act XIX of 1873. If those arrears had not been discharged and the property had been sold under s. 166, s. 167 would have applied, for the purchaser would have taken the property free from any incumbrance, except those, if any, specified in clauses A and B of that section. After those payments were made, the defendant, who is the representative of the mortgagors, paid into Court, under s. 83 of the Transfer of Property Act, Rs. 25,000, which was the amount which had been advanced under the mortgage. Upon that the plaintiffs presented a petition saying that they would take out the Rs. 25,000 in satis-

(1) I. L. R., 14 Calc., 809.
(2) I. L. R., 8 All., 384.
(3) I. L. R., 11 Bom., 313.
(4) I. L. R., 10 All., 611.
(5) Weekly Notes, 1890, p. 90.
(6) I. L. R., 2 All., 193.
(7) I. L. R., 8 Calc., 402.
(8) 11 Moo. I. A., 241.

faction of the mortgage, and they would in future claim the money paid in respect of arrears of the revenue. They also deposited in Court the mortgage-deed and obtained the payment out to them of the Rs. 25,000.

The first Court decreed the claim to some extent. The District Judge of Bareilly dismissed the claim altogether. We should mention that it was provided in the mortgage-deed as follows:—"At the time of the settlement, whatever reduction or enhancement may happen in the Government revenue, we mortgagors take upon us." The arrears of the revenue which were paid by the plaintiffs represent an enhancement within the meaning of that clause in the mortgage-deed. Mr. *Durga Charan*, who has argued this case very fully and with much ability, has contended that his clients, the plaintiffs-appellants here, upon payment of those arrears of the revenue, obtained a charge in equity upon the property, and a charge which was quite independent of the mortgage which they had held; further, a charge in enforcement of which they are entitled to a decree for a sale of the property, notwithstanding their having abandoned their lien under the mortgage. He has cited to us a great number of authorities, most of which are referred to in the case of *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (1). Those authorities which he has cited to us which do not appear to be referred to specifically in that case are the cases of *Lachman Singh* v. *Salig Ram* (2); *Achut Ramchandra Pai* v. *Hari Kamti* (3); *Girdhar Lal* v. *Bhola Nath* (4); *Parsotam Das* v. *Jaijit Singh* (5); *Nikka Mal* v. *Sulaiman Sheikh Gardner* (6). There is no doubt that, with the exception of the case of *Kristo Mohinee Dossee* v. *Kaliprosono Ghose* (7), and the case of *Kinu Ram Das* v. *Mozaffer Hosain Shaha* (1), there seems to have been a consensus of opinion in the High Courts in India that a payment of money under such circumstances as the payment in this case of the arrears of the revenue created a charge in equity in favour of the person paying the money. In the case of *Kinu Ram Das* v. *Mozaffer Hosain Shaha*

(1) I. L. R., 14 Calc., 809.
(2) I. L. R., 8 All., 384.
(3) I. L. R., 11 Bom., 313.
(4) I. L. R., 10 All., 611.
(5) Weekly Notes, 1889, p. 99.
(6) I. L. R., 2 All., 193.
(7). I. L. R., 8 Calc., 402.

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(1) a majority of three Judges in a Court of five held that such a payment did not create a charge. The majority held that where a mortgagee paid money under such circumstances the mortgagee might add it to the amount of his mortgage and thereby extend his lien. We have no doubt that when money is paid by a mortgagee to protect the mortgaged property from sale for arrears of the Government revenue the mortgagee is entitled to add the amount so paid to the principal money due under his mortgage, and that in such a case the mortgage cannot be redeemed without paying those moneys; and further, that if the mortgagee proceeds to enforce his mortgage by sale of the mortgaged property, he can do so for the amount then due, which would include the amount so paid for arrears of revenue as well as any principal or interest outstanding. We do not think that the cases relied on by Mr. *Durga Charan*, even if they are good in law, and we do not intend to question them, put the case any higher than this, that a person who made a payment to save the property from sale on execution under circumstances which would make s. 69 of the Indian Contract Act applicable, obtained by such payment a charge in equity on such property. Although we think that it is not necessary to decide in this case whether a mortgagee making such payment would be entitled to bring a simple money-suit for the money paid, still we may point out that the case of *Lachman Singh* v. *Salig Ram* (2) and the case of *Parsotam Das* v. *Jaijit Singh* (3) are authorities to show that he might maintain such a suit. Those authorities are fortified by the decision of their Lordships of the Privy Council in *Nugenderchunder Ghose* v. *Sreemutty Kaminee Dossee* (4). It is true that the latter case turned on the effect of s. 9 of Act I of 1845, but that Act was repealed so far as the Lower Provinces of Bengal were concerned by Act II of 1859, and so far as these provinces are concerned by Act XIX of 1873. Still, the principle of the judgment in that case applies, whether the section to be considered is s. 9 of Act I, of 1845, or s. 69 of the Contract Act. It is not necessary to go further into that matter, because any right which the plaintiffs

(1) I. L. R., 14 Calc., 809.
(2) I. L. R., 8 All., 384.
(3) I. L. R., 11 Bom., 31 &c.
(4) I. L. R., 10 All., 611.

might have had as a personal remedy against the defendant has been long since barred by limitation. We do not think it necessary to express any opinion as to whether the majority of the Calcutta High Court in the case of *Kinu Ram Das* v. *Mozaffer Hosain Shaha* reported in (1) or the minority which represents in that judgment the previous consensus of opinion of the Indian Courts (excepting the case reported in I. L. R., 8 Calc.), and which minority has been followed since in Bombay and Madras, was right. In our opinion, whatever may be the position or right of a person paying money under such circumstances, who is not a mortgagee, the position of a mortgagee making such payments is this: if he makes such payment and wishes to seek a direct remedy against the mortgaged property in respect of them by a suit for sale of that mortgaged property, he must do so in his character and position as mortgagee, for it was in that character and position, and that only, he paid the money. He must, if he desires to bring the property to sale in respect of such payments, add on those payments to the principal money due under the mortgage. In other words, in our opinion, a mortgagee making such payments as mortgagee, does not, by reason of making those payments, obtain a lien independently of that under his mortgage. In this case the plaintiffs have lost their lien under the mortgage by having abandoned it, by having deposited the mortgage in Court to be handed over to the defendant, by having taken out of the Court the money which the defendant said was due on the mortgage, and by having quitted possession in favour of the mortgagor, the defendant. Having abandoned their lien and rights as mortgagees, it appears to us that the plaintiffs cannot revive them in order to sustain a suit for money which they could have added to the original mortgage-debt, and in respect of which they were entitled to continue in their character as mortgagees and to hold on to the deed of mortgage. S. 83 of the Transfer of Property Act is a section that was passed not only in the interest of mortgagors but in the interest of mortgagees. It was a section by which it was intended that a mortgage might be discharged by the mortgagor without any litigation, and it contemplated a mortgagee taking out of Court in satisfaction of the money due to him the

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money which had been paid in by the mortgagor, although the mortgage-debt at the time might exceed the money paid in. It provides that the mortgagee "on presenting a petition (verified in manner prescribed by law for the verification of plaints) stating the amount then due on the mortgage and his willingness to accept the moneys deposited in full discharge of such amount and on depositing in the same Court the mortgage-deed," &c. It appears to us immaterial that the plaintiffs here added a paragraph to their petition stating that they reserved their rights in respect of the money paid for arrears of revenue. The result is, we are of opinion that this suit cannot be maintained and we dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Mahmood and Mr. Justice Young.

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July 3.

NAUBAT SINGH AND OTHERS (DEFENDANTS) *v.* INDAR SINGH AND ANOTHER (PLAINTIFFS)*

Limitation—Suit by mortgagor to recover money due on a registered mortgage-deed—Act XV of 1877 *(Limitation Act), sch. ii, Nos* 113 *and* 116.

A suit by a mortgagor to recover money due on a registered mortgage-deed, together with damages for non-payment, is not a suit to which the period of limitation prescribed by the Limitation Act (Act XV of 1877), sch. ii, No. 113 (for specific performance of a contract) is applicable. The period of limitation applicable to such a suit is that prescribed by No. 116 of sch. ii of the said Act (for compensation for the breach of a contract in writing registered); and the time from which limitation will run against the mortgagor is, in the absence of any specific provision to the contrary, the date of the execution of the mortgage-deed *Gauri Shankar* v. *Surju* (1); *Husain Ali Khan* v. *Hafiz Ali Khan*, (2); *Nobocoomar Mookhopadhaya* v. *Siru Mullick* (3); *Vythilinga Pillai* v. *Thetchanamurti Pillai* (4); and *Ganesh Krishn* v. *Madhavrav Raiji* (5) referred to.

The facts of this case are fully stated in the judgment of Mahmood, J.

Hon. *T. Conlan* and Munshi *Sukh Nandan Lal*, for the appellants.

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* First appeal No 161 of 1888 from a decree of Maulvi Zain-ul-Abdin, Subordinate Judge of Moradabad, dated the 26th June 1888.

(1) I. L. R., 3 All. 276.
(2) I. L. R., 3 All. 600.
(3) I. L. R., 6 Calc. 94.
(4) I. L. R., 3 Mad. 76.
(5) I. L. R., 6 Bom. 75.

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Mr. *Amiruddin*, for the respondent.

MAHMOOD, J.—The facts of this case are very simple, as also the evidence upon which the determination of them depends.

The plaintiffs, Indar Singh and Basant Rai, executed an usufructuary mortgage-deed on the 3rd April 1882, in favour of Naubat Singh and others, the defendants-appellants before us. Under the terms of that deed the amount of the mortgage-money advanced was Rs. 9,000, and in regard to that sum the mortgage-deed mentioned that the money had already been received from the mortgagees by the mortgagors. At the time when the deed was presented to the Registrar for registration, Indar Singh and Basant Rai, both of whom appeared before the Registrar, made a statement to the effect that they had executed the deed, and that the deed was to be given to them, as they would get the money on delivering the document to the mortgagee. This statement was made to the Registrar and is incorporated by him in the endorsement which he made on the document.

It appears then that, in consequence of certain disputes which arose between the parties, the present defendants, mortgagees, filed a suit against the present plaintiffs for recovery of possession of the mortgaged property upon the allegation that they had been wrongfully kept out of possession by the mortgagors. The suit was filed on the 11th October 1882, and it was met principally by the plea that, as a matter of fact, the mortgagees, plaintiffs, had never paid the sum of Rs. 9,000 for which the mortgage had been executed, and that they were therefore not entitled to sue for possession, and there were other pleas also which need not be noticed here.

Upon the trial of that case by the Subordinate Judge of Moradabad, that officer, in his judgment dated the 11th May 1883, decreed the suit for possession, and in the course of his judgment he gave expression to the view that the plea of the mortgagors as to the total non-payment of the mortgage-money was unfounded, and that the mortgagees, plaintiffs before him, had paid at least a sum of Rs. 5,801-6-9, which was the amount of the debts due to

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them by the mortgagors on former accounts. The Subordinate Judge, as to the balance, went on to say :—"As regards the remainder of the mortgage amount there is no sufficient proof about it, nor is it necessary to settle this point at present."

As I have already stated, the general effect of the Subordinate Judge's decree was to decree the plaintiffs' suit for possession in favour of the mortgagees. But, although the decree was in their favour, they seem to have been dissatisfied with so much of the finding of the Subordinate Judge as gave colour to the view that only a sum of Rs. 5,801-6-9 had been paid by them, and that the payment of the remainder was not proved, and in respect of this finding they seem to have preferred an appeal to this Court on the 3rd of December 1883. The appeal came on for hearing before Petheram, C. J., and Duthoit, J., on the 12th December 1884, and the learned Judges then passed a judgment in the case which may be quoted *verbatim*, as it is short :—"All that is decided is that the plaintiff is entitled to a decree, as he was entitled to have possession of the security; whether the entire consideration of the bond had or had not passed was not a point directly in issue between the parties, and nothing has, therefore, been decided regarding it in this suit."

Upon this ground this Court dismissed the appeal before it. Matters seemed to have stood thus till the lapse of three years from the judgment of the High Court, when, on the 12th December 1887, this suit was instituted by the mortgagors, plaintiffs. The object of the suit was to obtain payment of the balance of the mortgage-money on the mortgage-deed of the 3rd April 1882, but the plaintiffs' case was not exactly the same as their defence in the former action. In this suit they have acknowledged the receipt of Rs. 5,801 out of the Rs. 9,000, the mortgage-money, thus accepting the finding of the Subordinate Judge in his judgment of the 11th May 1883, and they claim a sum of Rs. 3,199, the balance of the principal mortgage-money, and Rs. 3,300, interest thereon as damages, thus making a total claim of Rs. 6,499.

The suit was resisted mainly upon two grounds, *first*, that it was barred by limitation, and *secondly*, that, as a matter of fact, the

money payable by the defendants, mortgagees, to the plaintiffs-appellants as consideration of the mortgage-deed of the 3rd April 1882 had been duly paid by them, the defendants, mortgagees, and that therefore the suit should be dismissed. Now, upon the first of these points, *viz.*, that of limitation, the learned Subordinate Judge seems to have been of opinion that the cause of action which accrued to the plaintiffs for maintaining this suit, was the date of the High Court's judgment and decree of the 12th December 1884, and not any other date, and that the suit being just within time by one day, was not barred by limitation. This view is not clearly expressed in the judgment of the lower Court, and Mr. *Conlan* for the appellants has endeavoured to place an intelligible construction upon it by suggesting that probably the Subordinate Judge imported considerations such as those contemplated by s. 14 of the Indian Limitation Act (XV of 1877), when he allowed the whole of the litigation in the former suit to be excluded from the computation of the period of limitation. Mr. *Conlan* addressed a long argument to show that s. 14 of the Limitation Act did not cover the circumstances of this case, and was therefore inapplicable. But this contention was regarded by us as one not requiring any determination in this case, because the suit is within limitation, even if the contention were to be allowed.

Mr. *Conlan's* argument was that the article which governed this case was No. 113 of the Limitation Act (XV of 1877), which provides a period of only three years for suits for specific performance of a contract, and that period is to run from the date fixed for the performance or, if no such date is fixed, when the plaintiff has notice that performance is refused. The learned counsel argued that in this case the mortgage-deed having been executed on the 3rd April 1882, and containing in itself a necessary covenant that the mortgage was executed in lieu of the money to be advanced by the mortgagees to the mortgagors, the present suit for the recovery of the balance of such mortgage-money was a suit for specific performance of the contract, and that therefore the date of the mortgage itself was the date upon which the whole mortgage-money should have

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been paid, and default in such payment amounted to such a cause of action as would make limitation run against the plaintiffs.

Mr. *Amir-ud-din*, on behalf of the plaintiffs-respondents, resisted this contention by arguments which, again, we do not think we need notice at length, because, in our opinion, No. 113 of the Limitation Act does not govern the suit, because it is not a suit for specific performance of contract.

In my opinion the nature of the suit falls under the purview of No. 65 of the Limitation Act, because it is a suit for compensation for breach of a promise to do anything at a specified time, or upon the happening of a specified contingency, and for such a suit the limitation of time is a period of three years, calculated from the time when the time specified arrives or the contingency happens. This would have been the limitation applicable to this case if the mortgage-deed of the 3rd April 1882 had been a single unregistered document, but the document on which the plaintiffs sue is a registered instrument, and for that reason, in my opinion, No. 116 of the Limitation Act applies, which article provides generally for suits for compensation for the breach of a contract in writing registered the period of six years to be calculated from the time when the period of limitation would begin to run against a suit brought on a similar contract not registered.

The covenant in the contract of the mortgage-deed of the 3rd April 1882, was that the mortgagees would pay the money to the mortgagors as a loan advanced on security of landed property, and, in the absence of any words or indications to the contrary, that covenant must be taken to mean that the money would be paid down at the time of the execution of the document. This being so, the mere witholding of the payment of the mortgage-money by the mortgagee to the mortgagor would amount to a breach of contract in writing registered, as in this case, and a suit to recover the balance would be nothing other than a suit for compensation or damages caused by the breach of contract. There is really no distinction between a suit for compensation under these circumstances and a suit such as this, in which the mortgagor sues the mortgagees for

obtaining payment of the mortgage-money. The breach of contract having caused damages, the assessment and the measure of those damages would naturally be the amount of money contemplated by the covenant, that is to say, the sum which that covenant mentioned as the amount to be advanced, together with such other loss as the plaintiff may prove to have sustained in consequence of the breach of such covenant. This view is in principle in accord with the rulings of the various High Courts, *Vide—Nobocoomar Mookhopadhaya* v. *Siru Mullick* (1); *Vythilinga Pillai* v. *Thetchanamurti Pillai* (2); *Ganesh Krishn* v. *Madhavrav Ravji* (3); *Gauri Shankar* v. *Surju* (4); and *Husain Ali Khan* v. *Hafiz Ali Khan* (5).

There remains the second question which relates to the merits, namely, whether the amount mentioned as the mortgage-money in the deed of the 3rd April 1882, was actually paid by the defendants, mortgagees, to the plaintiffs, mortgagors. Upon this point the learned Subordinate Judge has expressed his finding in the following terms:—

"In short, the plaintiffs themselves admit the receipt of Rs. 5,801, out of the said mortgage-money Rs. 9,000, and, after deducting that, they claim in this suit Rs. 3,199 as balance of the principal mortgage-money. Now it is proved from the evidence on the record in this case that the following items have also been paid by the defendants, that is, Rs. 150, before the execution of the mortgage deed for purchasing the stamp paper of the mortgage-deed and for purposes of registration, &c., Rs. 630, which the plaintiffs received from the defendants on the 4th April 1882, and deposited in the Collectorate, and Rs. 200 paid to Shib Lal on account of the debt due from the plaintiffs. The total of these three items is Rs. 980. Therefore the items admitted to have been received and the items proved amount to Rs. 6,781."

This finding is not contested by the plaintiffs-respondents in this Court, and it shows that, even in this suit, their allegation as to the non-receipt of the mortgage-money was found by the lower

(1) I. L. R. 6 Calc. 94.
(2) I. L. R., 3 Mad 76.
(3) I. L. R., 6 Bom. 75.
(4) I. L. R., 3 All. 276.
(5) I. L. R., 3 All. 600.

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Court to be untrue to the extent of Rs. 980, the payment of which by the defendants was proved to the satisfaction of that Court. As to the balance of Rs. 2,219 (or rather, to be more accurate, Rs. 2,218-9-3) the lower Court has found that its payment by the defendants, mortgagees, to the plaintiffs, mortgagors, was not satisfactorily established. The main reasons why the lower Court arrived at this conclusion, are stated to be the non-production of a separate receipt by the defendants, and the fact that certain debts due by the plaintiffs-mortgagors to other creditors were not paid off. The Subordinate Judge sums up his conclusions in the following words :—

"The Court is of opinion that when the plaintiffs received the mortgage-deed after it had been registered, the defendants held out a temptation to the plaintiffs that, if the latter made over the mortgage-deed to the defendants and got the mutation of names effected regarding the mortgaged property by admitting that the whole mortgage-money had been paid, they would get a good sum in cash from the defendants out of the mortgage-money. Being tempted by this, the plaintiffs did what the defendants told them. But at last there arose a dispute between the parties regarding the possession and enjoyment of the *sír* lands, and the defendants did not pay any money in cash to the plaintiffs, and suits, &c., had to be instituted in the Court for possession of the mortgaged property. The present suit is the last of the series of cases which have resulted from all those disputes. I hold without any hesitation that the defendants have paid only Rs. 6,781-6-9 out of Rs. 9,000, the mortgage-money. It is by no means proved that the remaining Rs. 2,218-9-3 have been paid by the defendants."

Mr. *Conlan* for the defendants-appellants argues that these conclusions are purely conjectural and proceed upon a misapprehension of the rule of *onus probandi* as applicable to such cases. The learned counsel has invited our attention to a passage in Macpherson's work on mortgages (7th ed., p. 174) where the rule is stated to be that "when a person admits having executed a written instrument which contains a recital that the consideration has been

received, but seeks to avoid liability by pleading that full consideration according to the terms of the contract has not been received by him, the proof of such non-receipt rests upon him, and in the absence of such proof he must be held to the terms of the document to which he has affixed his signature. The written instrument is *primâ facie* evidence that the consideration has been received as recited, but it is not conclusive, and this *primâ facie* evidence may be rebutted."

This view is supported by many rulings cited in a footnote to the passage, and I have no doubt that the passage lays down a sound doctrine of law, namely, the broad principle that where a person makes admissions against his own interest, whether orally or in recitals in written instruments, the burden of explaining away those admissions in order to get rid of their effect in evidence rests upon him. This, indeed, is a well-established rule of our law and has received the sanction of the Lords of the Privy Council in many cases. The rule so far as it relates to admissions contained in deeds, is much less stringent in India than in England; for here such admissions are rebuttable, estoppels by deeds being unknown to our law in the Mofussil. Now what happened in the present case is best stated by the plaintiff, Indar Singh himself, who was examined as a witness in this case. The witness said:—"The mortgage-deed, dated the 3rd April 1882, for Rs. 9,000, executed by me and my brother Basant Rai, was presented in the registration office on the same day, *i. e.*, the 3rd April 1882, and was, on my and Basant Rai's declaration, registered in the *tahsíl* of Chandpur. After the completion of the registration, the registered mortgage-deed was given to me. I had caused it to be written in the registration office that the deed might be given to me in order to enable me to realize the money on delivering the deed. Both I and Basant Rai made the said statement. I and my brother Basant Rai got the registered mortgage-deed from the registration office." The witness, after some prevarication admitted that a portion of the mortgage-money was to be received in cash from the mortgagees at the time of the delivery of the mortgage-deed to them. He then

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went on to say :—"When I and Basant Rai got the mortgage-deed from the registration office, I and Basant Rai handed it to Naubat Singh after about ten or twenty days. I made statement in the mutation department also, namely, I stated that I had received the *whole* amount of the mortgage-money. I did all that trusting in him," that is, the mortgagee.

It appears to me that this statement is destructive to the plaintiffs' case as to the non-payment of the mortgage-money. The mortgage-deed itself contains an admission as to the full receipt of the mortgage-money, and that admission is only partially explained by the circumstance that the plaintiffs asked the registration officer to return the deed to them after registration, as they would themselves deliver the deed to the mortgagees on receiving the mortgage-money from them. The force of this precaution proves that the plaintiffs were far from being trustful of the mortgagees as Indar Singh, plaintiff, would have it in his deposition. This being so, we find, according to Indar Singh's own evidence, that the mortgage-deed was delivered to the mortgagees shortly after the registration. That was a contingency which, according to the plaintiffs' own statement, was to take place upon receipt of the mortgage-money from the mortgagees. Beyond the vague theory of trustfulness there is no explanation why the plaintiffs, mortgagors, after having expressly stated in the registration office that they would deliver the deed to the mortgagees on receipt of the mortgage-money, actually delivered the deed to them without receiving full payment. Nor does the case against the plaintiffs stop here, for we find that on the 27th April 1882 the plaintiffs, mortgagors, appeared before the revenue authorities and prayed for mutation of names in favour of the mortgagees, alleging that they had received full payment of the mortgage-money. There is no satisfactory explanation why the plaintiffs did so, if they had not received the mortgage-money in full.

The learned Subordinate Judge has not given due weight to the evidential effect of the plaintiffs' conduct in delivering the mortgage-deed to the mortgagees, and in solemnly admitting before the

revenue officer that they had received full payment of the mortgage-money. The Subordinate Judge has accepted the vague and feeble theory of trustfulness, and has rejected the defence as to payment, upon the ground that the defendants did not obtain a separate receipt for the balance of the mortgage-money (namely Rs. 2,218-9-3), but it seems to me that if the theory is to be accepted it would equally apply even if such a receipt were produced.

I am of opinion that, under the circumstances of this case, it rested entirely upon the plaintiffs to prove by cogent evidence that their conduct in delivering the mortgage-deed to the mortgagees and in solemnly admitting the receipt of the full mortgage-money before the revenue authorities in the mutation department was explainable on the ground of undue influence, fraud, or other circumstances which would explain away such conduct. They have not even attempted to produce any such evidence.

On the other hand, the defendants' case as to payment is supported, not only by the admissions and conduct of the plaintiffs themselves, but by direct evidence. They have produced their *karinda* or managing agent, Misri Lal, and also Ganga Ram, the patwári, who both state on oath that Rs. 2,029-8-0 were paid by the mortgagees, defendants, after settling the account with the plaintiffs, mortgagors, and that after receiving such payment the latter delivered the mortgage-deed to Naubat Singh, one of the mortgagees. The Subordinate Judge has also assigned no reason for disbelieving such evidence, and his judgment seems to have been too much influenced by the absence of a separate receipt. In my opinion the delivery of the mortgage-deed to the mortgagee and the plaintiffs' admission in the mutation department are quite sufficient to amount to evidence as good as, if not more cogent than, a separate receipt would have been, and the oral evidence in the case, taken with the plaintiffs' own conduct and admissions, proves the full payment of the mortgage-money.

It seems to me that the plaintiffs' conduct throughout the disputes relating to this mortgage has been blameable and prevaricating. In the former suit they denied the receipt of the mortgage-money

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altogether, but it was found that they had received at least Rs. 5,801. In the present case they admitted the receipt of that sum of money, but denied that they had received anything more. Even the Subordinate Judge, notwithstanding his misapprehension of the burden of proof in this case, found that Rs. 980 had been received by the plaintiffs over and above the sum of Rs. 5,801 which they admitted. This finding the plaintiffs do not dispute in this appeal, and their case as to the balance of the mortgage-money rests entirely upon the theory of trustfulness in the mortgagees, which theory, as I have already said, is feeble, vague and worthless under the circumstances of this case. There is only one more point which requires disposal. In the course of his argument Mr. *Amir-ud-din*, on behalf of the plaintiffs-respondents, contended that, inasmuch as in the former litigation the Subordinate Judge in his judgment of the 11th May 1883 held that only Rs. 5,801 had been proved to have been paid by the mortgagee, and inasmuch as that judgment was upheld in appeal by this Court in its judgment of the 12th December 1884, the finding in the former case operated as *res judicata* barring the defendants from pleading that any sum of money beyond that amount was ever paid by them to the plaintiffs as consideration of the mortgage. We intimated in the course of the hearing of this case that this plea has no force. I have already quoted from the judgment of this Court, dated the 12th December 1884, and it leaves no doubt that all that was intended to be decided in the former litigation was whether a portion of the mortgage-money had been paid by the mortgagees entitling them to possession, and that no definite finding was intended to be arrived at as to the exact amount which had been advanced by the mortgagees.

For these reasons I would decree the appeal, and, setting aside the decree of the lower Court, dismiss the suit with costs in both Courts.

YOUNG, J.—The facts of the case have been so fully set forth by my brother Mahmood, that it is unnecessary for me to say more than that I fully concur with him in the conclusions at which he has arrived. The issue of limitation discussed in the former part

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of his judgment was one which occupied us for some time. I have no doubt that the suit is not barred by limitation. But the fact of the plaintiffs' having delivered the mortgage-deed to the mortgagees, notwithstanding their clear perception that after having done so further payments from the mortgagees were not likely to be made, and the fact that only a few days previously the plaintiffs had stated before the registering officer that they would retain the mortgage-deed till they had received the balance of the consideration-money, and further, the fact that the plaintiffs themselves in the mutation department clearly acknowledged the receipt of the balance of the consideration-money, leave in my mind no doubt whatever that the plaintiffs cannot now come into Court and set up an allegation of the non-receipt of the consideration-money. It would be impossible for Courts of Justice to come to any definite conclusions if conduct so unequivocal and admissions so distinct are to be treated as wholly meaningless. For these reasons I concur with my brother Mahmood, and would dismiss the plaintiffs' suit and decree the appeal with costs.

Appeal decreed.

Before Mr Justice Young.

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November 4.

BANSI (JUDGMENT-DEBTOR) *v.* SIKREE MAL (DECREE-HOLDER.) *

Execution of decree—Step in aid of execution—Application by decree-holder for leave to bid at sale—Act XV of 1877 (*Limitation Act*) *sch II, No.* 179, *cl.* (4).

The making of an application by the decree-holder for leave to bid at the sale in execution of his decree is "a step in aid of execution" within the meaning of cl. (4), No. 179, sch. ii of the Limitation Act (Act XV of 1877).

THE facts of this case sufficiently appear from the judgment of Young, J.

Munshi *Madho Prasad,* for the appellant.

The respondent was not represented.

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* Second Appeal No 362 from an order of A Sells, Esq., District Judge of Meerut, dated the 14th December 1889, confirming the order of Munshi Jafar Husain, Munsif of Meerut, dated the 22nd of March 1889.

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YOUNG, J.—This is a second appeal against the order of the District Judge of Meerut, dated the 14th December 1889, dismissing the appeal of Bansi, judgment-debtor, appellant, from the decree of the Munsif of Meerut, dated the 22nd March 1889. The judgment-debtor had objected to his creditor's taking out execution of the decree, dated the 20th July 1880, and the ground taken was that more than the legal period had expired between the date of the present application for execution and the last legal occasion of such execution. It appears that the first application for execution was made on the 13th April 1881, while the second application was dated the 17th February 1885, a period therefore of nearly four years from the first application for execution. It is alleged that the second application, that is, the one in 1885, was time-barred and therefore such proceedings could in no wise form a legal starting point for the computation of a new period of limitation. It is alleged that the third application for execution which took place on the 12th May 1886, was therefore time-barred and invalid, and could not suffice to keep alive a decree already dead; and that consequently the application of the 3rd June 1889 was time-barred. These objections were disallowed by the Munsif and the learned District Judge concurs with him in that opinion. The learned Judge says:—

"In this case execution of decree was first applied for in April 1881, and proceedings continued till towards the end of 1882. On the 17th February 1885, another application was made, notice issued, and attachment followed, but no objection was raised on the plea of limitation, and this being so I do not consider that it can now be raised at the time of this *third* period of execution proceedings." [I may observe parenthetically that the learned Judge should have said, at the time of this *fourth* period of execution proceedings.] The learned Judge continues:—"Apart from this, it is shown that on the 18th March 1882, the time of sale drawing near, the decree-holder applied for permission to bid and this was allowed, and this must, it seems to me, be considered to be a step taken in aid of execution, and in my opinion therefore the plea of limitation even would not avail."

Against this contention Mr. *Madho Prasad* quoted *Toree Mahomed* v. *Mahomed Mahood Bux* (1) where it was held that "the mere payment of a court-fee in connection with execution-proceedings with a view to obtain leave to bid for property then up for sale in execution of a decree does not constitute 'the taking of some step in aid of execution' within the meaning of No. 179, sch. ii. of the Limitation Act (XV of 1877)."

I observe that in that case the act alleged to be in furtherance of the execution was the mere payment of a fee of Rs. 2. In the present instance it seems that the decree-holder did more. He applied to the Court for permission to bid, and, with all respect to the Calcutta Court, I am unable to see how such proceeding is other than taking a step in aid of execution of decree.

Mr. *Madho Prasad* further urged upon my notice that the proceedings taken by the decree-holder in the year 1885 were very faulty, in fact, the learned counsel stigmatized them as fraudulent. He urged that no proper notice was given to the judgment-debtor, who was in jail at the time, and was not served with notice (as he alleges) until after the expiry of the time for making objections. Be that as it may, it does not appear to me that a Court can rip up the past proceedings of other Courts and determine, for the purposes of deciding of limitation in subsequent execution proceedings, whether those past proceedings were properly conducted or not. No doubt the words of the law, No 179, clause (4), do show that the application, the date of which is to be the starting point for a new period of limitation, must be an application in accordance with law to the proper Court, but I take it that it does not empower Courts in subsequent applications for execution to discuss the propriety and legality of the action of previous Courts in previous execution-proceedings, but merely denotes that the application which is to form the starting point for a new period of limitation is to be an application not made out of Court, but made in Court, according to the general law for execution of decrees, and provided such application falls generally under the provisions

(1) I. L. R., 9 Calc. 730.

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of the law, the regularity of the procedure of former Courts is a matter beyond the cognizance of a subsequent Court of execution. As to the chief objection taken by Mr. *Madho Prasad*, namely, that nearly four years had elapsed between the date of the first and the second applications for execution, I am of opinion that the Judge assigns good reasons for believing that the second application was not time-barred, and, this being so, I have merely expressed my opinion that the lower appellate Court has come to a right conclusion in affirming the decree of the Court of first instance. The appeal is dismissed. Respondent not appearing, no order as to costs.

Appeal dismissed.

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January 31.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

BHAGWANI AND ANOTHER (PETITIONERS) *v.* MANNI LAL AND ANOTHER (OPPOSITE PARTIES)*

Act VII of 1889 (*Succession Certificate Act*), ss. 9 *and* 19—*Order granting certificate conditioned on the filing of security—Appeal.*

Where on an application for a certificate of succession under the Succession Certificate Act (Act VII of 1889) an order was made granting the certificate conditionally on the applicants' furnishing security.

Held that this was not an order "granting, refusing or revoking a certificate" within the meaning of s. 19 of the Act, and that therefore no appeal would lie therefrom.

THE question decided in this appeal originally came in first appeal before Mahmood, J., † and was by him decided on grounds similar to those on which the judgment of the Court in the present appeal is based. The facts of the case sufficiently appear from the judgment of Mahmood, J., which is as follows:—

MAHMOOD, J.—Upon this appeal being called on for hearing, Pandit *Sundar Lal*, holding Mr. *Ram Prasad's* brief for the respondent, has taken a preliminary objection, to the effect that the appeal is premature, as no such order as that contemplated by s. 19 of the Succession Certificate Act (VII of 1889) has yet been made in

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* Appeal No. 47 of 1890, under s. 10 of the Letters Patent.

† First Appeal No. 46 of 1890 from an order of H. T. D. Pennington, Esq., District Judge of Ghazipur, dated the 21st March 1890.

the case. In support of this objection the learned pleader relies on the principle of a Division Bench ruling of this Court in the case of *Ali Ahmad Khan*, appellant (1), which, however, related to ss. 22 and 28 of Act XL of 1858. In that case the principle was laid down that no appeal lay from interlocutory orders under that enactment. Mr. *Amir-ud-din* in resisting this contention on the preliminary point has invited my attention to the provisions of cl. (3), of s. 7. cl. (*f*) of s 6, and ss. 10, 11 and 12 of the Act (VII of 1889), and with reference to these provisions he has argued that the learned District Judge's order of the 21st March 1890, from which this appeal has been preferred, is erroneous in law.

I do not, however, think that it is necessary for me at this stage to adjudicate upon the question whether the opinions expressed by the District Judge and the action which he has taken are in accordance with law. What I have to consider is whether the order of the learned District Judge dated the 21st March 1890, from which this appeal has been preferred, was a final adjudication, that is, such an order as s. 19 of the Succession Certificate Act (VII of 1889) contemplates. That section is the solitary authority under which any appeal from orders under the enactment can lie. The right of appeal is a creation of the statute, and if the order complained of in this appeal does not fall under the section, the appeal is premature and unsustainable at this stage.

Now it seems to me that the order appealed from was only an interlocutory order, and not the final order in the case. The learned District Judge expressed his intention to give the certificate to the appellants on their furnishing security to the amount of Rs. 20,000, and he gave them a month for compliance. He disallowed their plea that security for Rs. 3,000 was sufficient under the circumstances of the case, but whether such rejection of the plea was right or wrong, the order of the 21st March 1890, from which this appeal has been preferred is not an order "granting, refusing or revoking a certificate" within the meaning of s. 19 of the Succession Certificate Act (VII of 1889) which is the only authority for the right of

(1) Weekly Notes, 1884, p. 318.

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appeal. The final order remains yet to be made by the District Judge.

The preliminary objection prevails, and I hold that this appeal has been prematurely preferred and does not lie. I dismiss it with costs.

Against this judgment the present appeal under s. 10 of the Letters Patent was preferred by the petitioners.

Mr. *Amir-ud-din*, for the appellants.

Munshi *Ram Prasad*, for the respondents.

EDGE, C. J., AND STRAIGHT, J.—We entirely concur with the order passed by our brother Mahmood, and with his reasons for it. The appellants applied for a certifiate under Act VII of 1889. The Judge, acting under s. 9 of that Act, required security as a condition precedent to his granting the certificate. He was proposing to proceed under s. 7, cl. (3). S. 19, provides for appeals. There was no order granting or refusing a certificate. Our brother Mahmood was right in holding that no appeal lay. We dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

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February 4.

BHAWANI BAKHSH AND ANOTHER (PLAINTIFFS) *v.* RAM DAI AND OTHERS (DEFENDANTS.)*

Hindu law—Joint Hindu family—Mortgage executed by father on the whole joint family property in respect of his own debts—Liability of sons—Burden of proof.

The father of a joint and undivided Hindu family executed a mortgage over the whole immovable property of the joint family. The mortgagees having obtained a decree on their mortgage and having put an attachment on the joint family property, the minor sons of the mortgagor sued for a declaration that their interest in the attached property was not liable under the mortgagees' decree, inasmuch as the debts in respect of which the mortgage had been executed had been contracted for immoral purposes and were not such as they, by the Hindu law, were under a pious obligation to discharge. *Held* that the burden of proving that the debts in question were contracted for the purposes alleged lay on the plaintiffs.

* First Appeal, No. 144 of 1888, from a decree of Babu Nilmadhub Roy, Subordinate Judge of Gorakhpur, dated the 21st June 1888.

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Beni Madho v. *Basdeo Patak* (1) followed; *Lal Singh* v. *Deo Narain Singh* (2); *Bara Mal* v. *Maharaj Singh* (3); *Subramanya* v. *Sadasiva* (4); *Hanooman Persaud Panday* v. *Munraj Koonweree*; (5) and *Bhaglut Pershad Singh* v. *Girja Koer* (6) referred to.

The facts of this case are fully stated in the judgment of Straight, J.

Mr. *C. Dillon*, Munshi *Jwala Prasad* and Babu *Jogindro Nath Chaudhri*, for the appellants.

Mr. *T. Conlan* and Hon. *G. T. Spankie*, for the respondents.

STRAIGHT, J.—This appeal relates to a suit that belongs to a well-known class of cases in which the minor sons of a Hindu father, along with whom they were members of a joint and undivided Hindu family, seek to exempt their interests in the joint estate from the operation of a mortgage executed by the father of the entire family share in immovable property and a decree obtained thereon by the mortgagee, followed by attachment of the whole joint family interest. The two minors in the present suit, with their mother as their guardian "*ad litem*," who also sues on her own account, are the plaintiffs, and the first defendant, when the suit was instituted, was their father, Sada Nand, who has died *pendente lite*, while the sons of Lala Ram Charan Lal, the mortgagee and creditor of Sada Nand, were the two other defendants. It is not necessary to detail at length the terms of the plaint. It is enough to say that the plaintiffs allege that the mortgage transaction, out of which the decree passed against their father upon the mortgage arose, represented a debt incurred by their father, which, under the Hindu law, it was not their pious duty or obligation to discharge. This particular mortgage transaction was dated the 5th August 1882, and the total consideration for it was the sum of Rs. 2,959-10-0. The decree was obtained by the mortgagee for the sale of the mortgaged property upon the 31st July 1886. An attachment of the whole zamíndári interest was then put on, to which attachment the plaintiffs offered objections. Their objections were disallowed on the

(1) I. L. R. 12 All. 99.
(2) I. L. R. 8 All. 279.
(3) I. L. R. 8 All. 205.
(4) I. L. R. 8 Mad 75.
(5) 6 Moo. I A 393.
(6) I. L. R. 15 Calc. 717.

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9th April 1887; hence the present suit to have it declared that the rights of the several plaintiffs should be exempted from the attachment and threatened sale; in other words, the plaintiffs say that the defendants are not entitled to sell more than the individual interest of their father. It is admitted on all hands that the mortgage of the 5th August 1882 was a mortgage of the whole of the family interest in two mauzas. It is also admitted that the decree was passed against the father upon the mortgage for the sale of the whole property without limitation or exception of any kind, and it is further admitted that the attachment, which still holds upon the property, is an attachment that *primâ facie* affects the entire interest. The defence of the creditors to the suit was generally to the effect that the father of the minor plaintiffs was not the immoral person he was represented to be; that the money was advanced to meet the valid necessities of the family; and that the father in his character of father of minor sons of a joint Hindu family was the managing member, and, as such, entitled to sell or mortgage for the necessary purposes of the family the joint family property. The learned Subordinate Judge, a Hindu Judicial Officer of long experience, who tried the case, though he does not in terms say that he did so, cast the "*onus*" of proving the allegations contained in the plaint upon the plaintiffs, and, in my opinion, rightly. Upon the evidence which they produced, consisting of the oral testimony of several witnesses and documentary evidence in the shape of prior bonds of Sada Nand's, he came to the conclusion that the money had been borrowed by the father for immoral expenses, and that the defendants were affected with notice of the purpose for which the money was required, and that they knew at the time they made the advances the purposes to which they were to be devoted. He therefore gave the two minor plaintiffs a decree, by which their interests in the property mortgaged by their father were exempted from the operation of the mortgage decree and attachment, but as regards the claim of the plaintiff mother, he held that she, not being an heiress under the Hindu law, could not claim any share, though, had a partition taken place, she would then have been entitled to

a share. With regard to her, therefore, the suit was dismissed. The appeal to this Court by the defendants has been fought upon two grounds only. The first of them is that the "*onus*" of proof was wrongly thrown upon them. The second is that the proof presented by the plaintiffs and the findings of the learned Subordinate Judge thereon are not sufficient to sustain the decree, and in this connection it was incidentally urged that the defendants had proved that the loan made to the father was for legal purposes. There is no appeal on behalf of Musammat Ram Dai for herself to the effect that the learned Subordinate Judge's dismissal of her claim was erroneous. As to the first point raised, namely, as to with whom rested the *onus*, I do not observe, as I have remarked already, anything in the learned Subordinate Judge's judgment to indicate specific expression of his view as to with whom it lay; but I have no doubt, and in expressing this opinion I am only following the authority of *Beni Madho* v. *Basdeo Patak* (1), that the burden of proof rested upon the plaintiffs, who could only escape from their obligation under the Hindu law to pay the debt incurred by their father by showing that the debt was one incurred for immoral purposes. Reference has been made on the other side in the course of the hearing of the appeal to numerous authorities of their Lordships of the Privy Council and to a ruling of this Bench in *Lal Singh* v. *Deo Narain Singh* (2), which is in consonance with the ruling of the Madras High Court in *Subramanya* v. *Sadasiva* (3). Whatever may have been the view expressed in these two last mentioned rulings upon the authorities as they stood at the time they were given, it seems to me that, for the reasons which were stated by me, with the approval of Sir Comer Petheram, in the case of *Basa Mal* v. *Maharaj Singh* (4), and in the case of *Beni Madho* v. *Basdeo Patak* (1) already referred to, it does not now represent the correct rule of law as declared by the later decisions of their Lordships of the Privy Council which are set out in detail in those two last mentioned rulings. With regard to the case of *Lal Singh* v. *Deo Narain Singh* (2), it was a judgment

(1) I L. R 12 All. 99.
(2) I. L R 6 All 279.
(3) I L R 8 Mad 75.
(4) I. L R. 8 All. 205.

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of my own in which my brother Tyrrell concurred, and it is to be noted that it proceeded largely, if not entirely, upon the principles laid down in the well-known case of *Hunooman Persaud Panday* (1). But it seems to me that in the case of *Lal Singh* v. *Deo Narain Singh* (2) I omitted to bear in mind the distinction that the case of *Hunooman Persaud Panday* was the case of a guardian and manager of an infant in the person of a mother with whom certain transactions were had, and that it was not the case of a Hindu father living jointly with his minor sons whose position is a very different one. As regards the powers of an ordinary guardian these are limited, while the powers of a father as manager for his minor sons can only be questioned by those sons when he has effected a charge on the whole property, upon the ground that the charge so created was for immoral purposes, that is to say, for purposes which it was not their pious obligation to discharge. At least this is what I take to be the outcome of all the authorities upon the subject, and that, while it may well be that in a family of joint brothers, or in the case of a guardian of the kind I have mentioned, the rule of *Hunooman Persaud Panday's* case may be properly applied; in the case of a father, who is admittedly the managing member of his joint family, it being the pious obligation of his sons to pay his debts, except under certain circumstances, the presumption is that his debts have been legally incurred until the sons have shown to the contrary. Upon further consideration, therefore, I have come to the conclusion that the case of *Lal Singh* v. *Deo Narain Singh* (2), so far as it laid down that the "onus" rested upon the creditor in reference to a transaction with the father in his capacity of a managing member of a joint family, was wrong, and I am borne out in this by the case of *Bhagbut Pershad Singh* v. *Girja Koer* (3). In the last passage of the judgment in the case of *Beni Madho* v. *Basdeo Patak* (4), I stated what seemed to me to be the outcome of the later rulings that succeeded the ruling in *Basa Mal* v. *Maharaj Singh* (5), and for the purpose of guarding against any misunderstanding I may here repeat that in

(1) 6 Moo I A 393.
(2) I. L. R., 8 All 279.
(3) I L R. 15 Calc. 717.
(4) I L R., 12 All 99.
(5) I. L. R, 8 Mad. 75.

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my opinion in all cases like the present, where a son or sons is or are coming into Court to assail a mortgage of the whole joint estate made by the father, upon which a decree has been passed against him and sale has been ordered of the whole estate and an attachment has been made of the whole estate, the son or sons can only escape from the effect of the decree and attachment by showing that the debt in respect of which the transaction of mortgage originated was a debt which they, as the sons of a Hindu and members of a joint Hindu family, were not under a pious obligation to discharge. Whether or not it was necessary for the decree-holder with a decree for sale to resort to an attachment I do not stop to enquire. In the present case he has done so, and in that way an opportunity presented itself to the minor plaintiffs to make the objection which brought about the present suit. In saying this it must not be understood to mean that, if the mortgagee had sold the property without first putting an attachment on it and had purchased it himself or had sold it to others, the sons could not have brought a suit on the same grounds upon which they now come forward. Mr. *Spankie* for the plaintiffs admits that the *onus* may ordinarily rest upon them to establish the immorality of the debt, and the only distinction that he seeks to have drawn is that if the decree-holder himself was the purchaser, then the *onus* would rest upon him; but I fail, for the purpose of dealing with the question with whom the proof lies in cases of this kind, to see why any distinction should be drawn between a stranger purchaser at an execution sale and the decree-holder who himself becomes the purchaser. If my view in this respect is right, then arises the question—have the plaintiffs satisfactorily established the case upon which alone they can succeed? I have remarked above that the learned Subordinate Judge who tried the case was a Hindu gentleman of long judicial experience, and I think that this is not a wholly unimportant circumstance in judging as to the value of his opinion on the merits of a case like the present. He has found in terms that the father of the minor plaintiffs was a dissolute, disreputable person, given to gambling, to keeping prostitutes, to drinking strong liquor and to smoking opium; in other words, he has come to the conclu-

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sion that the life of the father was an evil one. To use the learned Subordinate Judge's own words :—

"Sada Nand was a known gambler and spendthrift. He used to smoke *chandu* and keep prostitutes. He was a confirmed drunkard. He had been borrowing these moneys for these immoral expenses. Defendants live near plaintiff's house. They were fully aware of his bad habits, and yet these greedy and grasping *banias* advanced large sums of money for their own selfish ends and for the ultimate ruin of this wretched family. The character of Sada Nand has been proved by the evidence of the *kotwal* and other respectable witnesses. It is a notorious fact in this city (as proved by the evidence in the record) that Sada Nand was a man of bad character, and that he was borrowing large sums of money to meet his selfish and immoral demands. These creditors, who are almost his next door neighbours, advanced large sums of money fully knowing how those sums were spent. No legal necessity has been proved. I fail to understand how plaintiffs were benefited by this loan. No house was built at Soomli. No money was paid in any *taksim* case, and the private expenses were nothing but money spent in *ganja*, opium, wine, gambling and bazár women. A Court of justice can never tolerate the advancement of money for such immoral purposes, and the ancestral property to the extent of the shares of the minors cannot be held responsible for the discharge of such illegal debts."

The evidence also shows that the estate when it came to Sada Nand produced an income of about Rs. 70 a month, which, it is clear, could have in no way sufficed to meet his expenses. It is not unimportant to examine the precise character of the several transactions which took place between the plaintiff's father and the defendants. The first of them was on the 4th April 1880, and it was for the sum of Rs. 699, and a portion of it represented, we do not know how much of it, an antecedent debt due to some bankers of the name of Anant Lal and others, but the residue is spoken of as "for my own private expenses" and the rate of interest was Re. 1-8-0 per cent. *per mensem*. Within a little more than four months from this date a second transaction is entered into in which the first bond

and interest due thereupon is consolidated, and a further cash advance for "personal expenses" is taken amounting to Rs. 1,099. Then in April of the following year a sum of Rs. 700 is taken "for my own private expenses," and again on the 11th August 1881, a sum of Rs. 499 is taken "for my own private expenses," and then at last on the 5th August 1882, all these antecedent loans are lumped together, amounting in all to Rs. 2,959-10-0. They are recited in the mortgage-deed, as also a sum of Rs. 950, "to pay the money of a banker and for meeting the partition and private expenses."

The learned Subordinate Judge, having all the facts before him and the evidence of the witnesses on behalf of the plaintiffs, came to the conclusion that the moneys and former advances covered by the bond of the 5th August 1882, were borrowed for and devoted to immoral purposes. Then comes the question, had the defendants notice that they were borrowed for those immoral purposes. The learned Subordinate Judge has found that they had, and I agree with him that the creditor, not only in this case, but in ninety-nine cases out of a hundred, knows to a nicety the status and character of the father and of the family, the number of his children, his mode and way of life and the purposes for which he wants the money. The money-lenders in the towns and villages of these provinces never lend their money without the most thorough and searching inquiry into the character and antecedents of the borrower, and, if a person was leading such a life as it is found that the father was leading in this particular case, the presumption is overwhelming that the money-lender, who lived within two doors of him, knew well what his character was, why it was he wanted money, and what purposes he required it for. I cannot say that, upon such facts as those found by the learned Subordinate Judge in this particular case, the proof required from the son in a suit of this nature, namely, that the debts were incurred for immoral purposes and that these purposes were well known to the party who lent the money, was not supplied. At any rate, the learned counsel on behalf of the creditor has not satisfied me that the learned Subordinate Judge had no materials before him to warrant

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his conclusions, and this being so, the appeal is dismissed with costs.

I have to add that our decree will not be issued to or on behalf of the plaintiffs-respondents until they have made good the deficiency of Rs. 415 which they should have paid as Court-fee for the suit in the Court of first instance, as reported to us by our Registrar on the 13th August 1888.

TYRRELL, J.—I concur.

Appeal dismissed.

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June 21.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Mahmood and Mr. Justice Young.

BAIJ NATH (DEFENDANT) *v.* SITAL SINGH (PLAINTIFF.)*

Act XIX of 1873 (*North-Western Provinces Land Revenue Act*) *ss.* 166, 168 *and* 188—*Act XII of* 1881 (*North-Western Provinces Rent Act*), *s.* 177—*Interpretation of Statutes—Meaning of the terms "Patti" and "Patti of a mahál"—Pre-emption.*

The expression "patti of a mahál" as used in s. 188 of the North-Western Provinces Land Revenue Act (Act XIX of 1873) means a division of a mahál distinct from the share of an individual co-sharer.

The right of pre-emption, therefore, which is given by the above-named section is not exercisable on the sale merely of the share of an individual co-sharer not amounting to such a division of a mahál.

Moreover the provisions of s. 188 of Act XIX of 1873 do not apply to a sale under s. 168 of the same Act of land other than that in respect of which the arrears which it is sold to satisfy accrued.

Hence where the share of a co-sharer in an imperfect pattidari village, not being the land in respect of which the arrears of rent, for the satisfaction of which the said share is sold, are due, is sold under the provisions of s. 177 of the North-Western Provinces Rent Act (Act XII of 1881), no right of pre-emption can be claimed in respect of such sale.

So held by EDGE, C. J. and YOUNG, J.

MAHMOOD, J. *contra.* There being no statutory definition of the word "patti" that word must be taken in its ordinary acceptation, and in that acceptation it means the share of a pattidar, whether such share amounts to a definite division of a mahál

* Second appeal No. 967 of 1888 from a decree of Rai Isri Prasad, Subordinate Judge of Farakhabad, dated the 31st March 1888, reversing a decree of Maulvi Muhammad Mazhar Husain, Munsif of Kanauj, dated the 22nd December 1887.

or not. The exigencies of the law of pre-emption require that in s 188 of Act XIX of 1873 the word "patti" should be construed in its broader signification as equivalent to any share of a pattidar.

The words of s. 168 which provide that land sold under that section is to be proceeded against "as if it were the land on account of which the revenue is due under the provisions of this Act" render the incidents of sales under s. 166, including pre-emption, applicable to sales under s. 168, with the exception that in such case only the defaulter's interest in the land sold passes by the sale.

Hence a right of pre-emption would accrue under s. 188 in respect of the compulsory sale of any share of a co-sharer though such share did not amount to a "patti" in the sense of a definite division of a mahál.

THE facts of this case are fully stated in the judgment of Mahmood, J.

Pandit *Ajudhia Nath*, for the appellant.

Pandit *Sundar Lal*, for the respondent.

MAHMOOD, J.—The village Musafirpur consists of three *pattis:*—

I	Comprising	6	Bis.	13½	biswansis
II	„	6	„	13¼	„
III	„	6	„	13¼	„

thus making up the aggregate of 20 biswas of the whole village which constitutes one and the same *mahál*.

The *mahál* appears to have been divided only by imperfect partition, and the estate therefore is an imperfect *pattidari zamindári* tenure, and one and the same *wajib-ul-arz* governs the *mahál*, and there is only one *lambardar* of the whole *mahál*. One Lala Singh owned a 1 biswa 12 biswansis share in *patti* III, and in the same *patti* one Bhoja Singh owns a share, whilst the plaintiff Sital Singh is a sharer in *patti* I.

In execution of a Revenue Court's decree for arrears of rent, held by one Tulshi Ram against Lala Singh, the latter's whole share of 1 biswa 2 biswansis 5 kachwansis in *patti* III was sold by auction on the 20th August 1886, under s. 177 of the Rent Act (XII of 1881), and the highest bidder was the defendant, Baijnath, whose bid of Rs. 100 concluded the sale. The plaintiff-respondent, Sital Singh, joined Bhoja Singh in asserting their pre-emptive right as

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co-sharers in the *mahál* under s. 188 of the Revenue Act (XIX of 1873), and deposited the sale consideration. The Revenue Court, however, rejected the plaintiffs' pre-emptive claim and confirmed the sale in favor of the defendant, Baijnath, by its order of the 17th September 1886.

The present suit was instituted on the 16th August 1887 by Sital Singh and Bhoja Singh jointly in the Civil Court with the object of setting aside the Revenue Court's order of the 17th September 1886, and obtaining a declaration that the plaintiffs, by virtue of their right of pre-emption, were entitled to the benefits of the auction-sale of the 20th August 1886, in preference to the defendant, Baijnath, purchaser at that auction, and they also prayed for recovery of possession of the property sold on payment to the defendant of Rs. 100 purchase-money already deposited by them.

The suit was resisted by the defendant purchaser mainly upon the ground that, the property in suit not being an entire *patti* of a *mahál*, but only a portion of a *patti*, no right of pre-emption accrued in favor of the plaintiffs by the auction-sale of the 20th August 1886, and that the plaintiffs could not maintain the suit as they had no pecuniary means to purchase, their own property being under mortgage.

The Court of first instance held that s. 177 of the Rent Act read with s. 188 of the Revenue Act restricted the right of pre-emption in respect of auction-sales to entire *pattis* and did not extend to cases such as the present in which only a portion of the *patti* was sold. For this view that Court relied upon a Division Bench ruling of this Court in *Narain Singh* v. *Muhammad Faruk* (1) and dismissed the suit. Upon appeal, the lower appellate Court, distinguishing the case from that ruling, held that the pre-emptive right provided by s. 188 of the Revenue Act (XIX of 1873) applied also to auction-sales of portions of *pattis*, and that the suit was maintainable by Sital Singh as co-sharer of *patti* I, but that the other plaintiff, Bhoja Singh, being a co-sharer in *patti* III, of which a portion was sold, was not entitled to pre-emption,

(1) I. L. R., 1 All., 277.

as he might have saved the property from sale by paying up the money due under Tulsi Ram's decree for arrears of rent. The lower appellate Court, therefore, dismissed the suit so far as Bhoja Singh was concerned, but decreed it fully in favor of Sital Singh alone.

From the lower appellate Court's decree two appeals have arisen; one by the plaintiff, Bhoja Singh, (S. A. No. 998 of 1888), and the other preferred by Baijnath, defendant, upon the contention, *first*, that co-sharers have no right of pre-emption in respect of sales under the Rent Act; *secondly*, that s. 188 of the Revenue Act applies only to sales of entire *pattis*; and, *thirdly*, that since the lower appellate Court has found that one of the plaintiffs, Bhoja Singh, was not entitled to pre-emption, it should also have held that the plaintiff-respondent, Sital Singh, had also forfeited his right of pre-emption by joining the aforesaid Bhoja Singh as plaintiff in the suit.

In dealing with this contention it is necessary to consider, in the first place, whether under the general law, as distinguished from specific legislative enactments, any right of pre-emption arises in respect of *compulsory* sales, such as those which take place by public auction in execution of decrees or for arrears of Government revenues. I am of opinion that this question must be answered in the negative, whether the right of pre-emption in respect of such sales is claimed under the Muhammadan law, the compact of the *wajib-ul-arz*, or local usage and custom. Such sales are not the result of any private contract to which the person whose property is sold is a party. They are the result of an authority conferred by the legislature upon the Courts for the purposes of awarding remedies against those who have failed to perform their pecuniary obligations. But for the specific interference of the Legislature such a power to sell the property of the debtor against his will could not be exercised by the Courts or the revenue authorities, and it would appear from general principles that when, in so interfering, the Legislature has framed specific rules, statute-law takes the place of general law, if any, *in pari materiâ* and excludes the application of the ordinary law of sale on account of the exigencies

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of procedure. The object of such sales is to secure satisfaction of debts by well defined means and methods calculated to achieve the object with certainty and expedition, and it seems clear that the object would be frustrated if such sales were hampered by the rules which govern private sales. The Legislature, however, in so interfering has not been heedless of the right of pre-emption. Under the rules of procedure compulsory sales take place after a public proclamation, which, being an act of the Court or revenue authority, is taken to be sufficient notice to the pre-emptors, along with the public at large, to come forward and purchase the property; and it seems reasonable to suppose that those who do not appear to bid at the auction sale have no wish to purchase the property. These considerations seem sufficient to render the ordinary law of pre-emption inapplicable to sales by public auction in execution of decrees, and this view has received judicial sanction.

So long ago as 1854, three learned Judges of the late *Sudder Dewanny Adawlut* of Agra, in *Chikhoree Singh* v. *Hukeem Nujuf Ali* (1), concurred in observing that "the right of pre-emption supposes an act of volition on the part of the vendor, a principal inapplicable to a transaction of compulsory sale made by any authoritative order or injunction, and that the incident of a public sale creates a new element beyond the ordinary scope of such right." Soon after, in 1855, the same Court, in *Mudar Buksh* v. *Muhummud Hussun* (2), took occasion to point out that their ruling was not to be understood to have repudiated the right of pre-emption in respect of compulsory sales when such right had been specifically created by statute. Referring to the earlier case the learned Judges said :—"the obvious intent of the whole judgment is that *ordinarily* the right of pre-emption is dependent on the *voluntary* character of the transfer made by the owner, but that Act I of 1841 has extended the principle to sales in execution of decrees made under the provisions of that Act, which are of a *special* nature, applying only to a particular class of tenures, and that they cannot be held to include sales of portions of *zumeendaree* tenures, and that

(1) N.-W. P. S. D. A. Rep., 1854, p. 40.

(2) N.-W. P. S. D. A. Rep, 1855, p. 597.

sales of the latter description, were not, either according to law or the custom of the country, subject to the law of pre-emption." The same view was adopted in *Sah Koondun Lal* v. *Ram Buksh* (1); and in *Baboo Ram Narain Singh* v. *Syud Sadik Ally* (2) a Full Bench of the same Court (with a majority of three out of five Judges) held that where the sale was a compulsory one no claim of pre-emption could be founded either on the *wajib-ul-arz* or the Muhammadan law, and in the case before them, the mauza and holding having been declared to be separate *mahâls*, the plaintiff's claim of pre-emption was untenable on either of the grounds on which it was laid. The same rule was adopted in *Seth Luchmee Chund* v. *Mussumat Kesur Buhoo* (3) where it was again pointed out that the rule was not to be understood as negativing the right of pre-emption in respect of compulsory sales where such right has been created by special enactments such as Act I of 1841. A similar view was adopted by the Calcutta High Court in *Abdool Juleel* v. *Khellat Chunder Ghose* (4) where the learned Judges, with reference to the ground taken by the special appellant that he was entitled as a co-sharer under the general law of pre-emption to have the property sold to him, observed that where property is sold by public auction at a sale in execution of a decree and the neighbour and partner has an opportunity to bid for the property as other parties present in Court, the ordinary law of pre-emption cannot apply to such sales. This ruling was followed by the same Court in the later case of *Shaikh Ferasut Ali* v. *Ashootosh Roy Singh* (5) also in *Sheikh Nuzmoodeen* v. *Kanye Jha* (6) where the rule was carried further by holding that even where the right of pre-emption between two co-sharers was based upon an express *ikrar* or agreement between them, sale in execution of a decree could not render the right enforcible, as it was the act of the Court, though such right might have been enforced if the transfer had been by private sale.

(1) N.-W. P. S. D. A. Rep., 1860, p. 194.
(2) N.-W. P. S. D. A. Rep, 1863, Vol. I, p. 325.
(3) N.-W. P. S. D. A. Rep., 1865, p. 139.
(4) 10 W. R. C. R., 165; 1 B. L. R. A. C., 105.
(5) 15 W. R. C. R, 455.
(6) 1 Marshall, 555; 2 Hay, 651.

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It may therefore be taken as a rule of law settled by a long and uniform course of decision that a compulsory sale, such as a sale in execution of decree or a sale under an authoritative order of the revenue authorities for arrears of Government revenue, does not render pre-emption enforcible, whether such right is claimed under Muhammadan law, the terms of the *wajib-ul-arz*, or on the ground of local custom or private contract; but that such compulsory sales being the creation of statute-law do furnish occasion for the exercise of the pre-emptive right where such right is provided, subject to the rules and restrictions prescribed by those Legislative enactments themselves. Thus, for sales in execution of Civil Courts' decrees, we have the provisions of s. 310 of the Code of Civil Procedure (Act XIV of 1882) which lays down that "when the property sold in execution of a decree is a share of undivided immovable property, and two or more persons, of whom one is a co-sharer, respectively advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding of the co-sharer," this provision being a reproduction, in a very amplified form, of the provisions of s. 14 of Act XXIII of 1861, which was limited to sale of shares of a *pattidari* estate as defined in s. 2 of Act I of 1841. Again, in respect of sales in execution of the revenue Courts' decrees we have special provision made by s. 177 of the N.-W. P. Rent Act (XII of 1881) which runs as follows:—

"If it appear to the Board that the debt cannot be recovered under s. 174, or if the sale of the property appear to it advisable on other grounds, it shall order the property to be sold, in which case the sale shall be made under the rules in force for the sale of land for arrears of land revenue, but without prejudice to the incumbrances (if any) to which such property may be subject."

In this case we are directly concerned with this section, because the auction-sale of the 20th August 1886, in respect of which pre-emption is claimed, took place in execution of a revenue Court's decree, and, if this section does not confer a right of pre-emption upon the plaintiffs, the suit, as I have already explained, could not

be maintained upon the ground of the general law of pre-emption going beyond the scope of the legislative enactments. Now it is clear that the terms of the section do not in themselves contain any words referring to the right of pre-emption, and if any such right is to be imported it can only be by a liberal interpretation of the words "the sale shall be made under the rules in force for the sale of land for arrears of land revenue," as they occur in the section. The first thing then is to determine whether the phrase "*the rules in force*" includes legislative provisions such as those found in the Land Revenue Act (XIX of 1873) as to sales of land for arrears of land revenue. This point was considered by a Bench of this Court in *Narain Singh* v. *Muhammad Faruk* (1) where the learned Judges observed :—"The only reference to pre-emption in Act XIX of 1873 is to be found in s. 188. It is contended that, as the sale is concluded before the claim to pre-emption can be made, the claim itself is not made under any rules for the conduct of sales. We should, however, be disposed to disallow this contention. It is not, however, necessary on the present occasion to determine the point." In the case now before us the question does require determination and I have no hesitation in holding that the word "*rules*" as it occurs in the section includes legislative enactments such as those contained in Act XIX of 1873, and that they refer to and include such provision as that enactment makes in respect of the manner in which sales in arrears of Government revenue are to be held and conducted, including the exercise of the right of pre-emption, which forms part and parcel of the matters entrusted to the officer conducting the sale. In *Syud Abdool Jaleel* v. *Kalee Koomar Dutt* (2) the High Court of Calcutta held that the Court executing a decree had no authority to substitute the claimant of pre-emption, under s. 14, Act XXIII of 1861, for the actual purchaser without the consent of the latter, and that a party claiming a share under the section cited is simply in the position of a party who having a right of pre-emption has observed the requisite formalities to enable him to assert the right and must resort to a civil suit to obtain the benefit thereof. This view of the law was expressly dissented from by a

(1) I. L. R., 1 All., 277. (2) 6 W. R., Misc. R., 3.

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Division Bench of this Court in *Tasuduk Ali* v. *Muksud Ali* (1), where the duties of the officer conducting an execution-sale in which claims for pre-emption under s. 14 of Act XXIII of 1861 are made, were considered, and it was laid down that it is incumbent on an officer conducting a sale in execution of a decree of land which is a share of a pattidari estate paying revenue to Government, as defined in s. 2 of Act I of 1841, to take notice of a claim made by a person under the provisions of s. 14 of Act XXIII of 1861, and to receive the purchase money as a fulfilment of the conditions of the sale, subject to any question which may be raised by any party interested in the sale as to the claimant's title to advance the claim. The learned Judge said :—"If the person at whose bid the property has been knocked down pays in the balance of the purchase-money as well as the claimant under s. 14, Act XXIII of 1861, the Court must pass orders for the acceptance of the money paid by the one, and for the return of the money deposited by the other. If, then, the conditions of sale are fulfilled by the claimant only, we see no reason why the sale should not be confirmed in his favour, if the Court be satisfied that he has established his right to advance the claim; and, on the like hypothesis, if there be a contention between a bidder and the claimant as to the right of the latter to advance the claim, we see no reason why the Court should refuse to adjudicate the question and to pass orders accordingly. There is nothing in the provisions of s. 14, Act XXIII of 1861, which discharges the Court executing the decree from the obligation of recognizing the right thereby given. If, after inquiring into the claim, the Court executing the decree considers the claimant's right doubtful, it would confirm the sale in favour of the bidder, leaving the claimant to his remedy by suit, but, if the right of the claimant be clear, the Court executing the decree is as much bound to give effect to that right as it would be if the question came before it in a regular suit."

In this view of the law I fully concur, and, applying it to the present case, I hold that the plaintiffs were entitled to ask the Court executing the decree to recognize them as pre-emptors in respect of

(1) N.-W. P. H. C. Rep., 1874, p 272.

the auction sale of the 20th August 1886, that, they having abided by the conditions to which the law subjected it as to the pre-emptive right, the sale should have been confirmed in their favor, and that, the order of the 17th September 1886, having been passed against them by the Revenue Court executing the decree, their proper remedy lay in a civil suit, such as this, in which they seek to set aside that order and to obtain possession of the property by enforcement of their statutory right of pre-emption. Nor should the ruling of this Court in *Shib Sahai* v. *Thika Ram* (1) be regarded as opposed to this view, for in that case, as far as it is intelligible from the report of the judgment, it can scarcely be said that the learned Judges intended to rule, as the head-note would represent, that after a Court executing a decree has disallowed a pre-emptive claim under s. 14 Act XXIII of 1861, though the pre-emptor duly observed the conditions of the sale, he is to be relegated to two separate suits: one for a declaration that he was entitled to the pre-emption of the property by substitution for the auction-purchaser, and another for recovery of possession of such property by enforcement of the right of pre-emption. The plaintiffs in the present case sued for declaration of their pre-emptive right in respect of the auction sale of the 20th August 1886; they also prayed for setting aside the Revenue Court's order of the 17th September 1886, whereby their claim was disallowed, and they further prayed for recovery of possession of the property by enforcement of their pre-emptive right. Such a suit seeks all that it could pray for and is in my opinion properly framed, and in no sense either premature or unmaintainable. Whether it succeeds or fails is a matter of the merits which must be considered with reference to the requirements of the law as to the right of pre-emption in respect of auction sales in execution of the Revenue Court's decrees in these Provinces.

I have already stated my reasons for holding that the provisions of s. 177 of the Rent Act (XII of 1881) refer to and must be read with the provisions of the Land Revenue Act (XIX of 1873)

(1) N.-W. P. H. C. Rep, 1875, p. 97.

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relating to sales for arrears of Government revenue. S. 150 of that Act provides the various processes for recovery of arrears of revenue, and clause (*g*) lays down that one of these is "by sale of such *patti* or of the whole *mahál*" and clause (*h*), going further in the same direction, prescribes another method to be "by sale of other immovable property of the defaulter." Thus there are two kinds of sale contemplated by these two separate clauses. The former is provided for by s. 166 which authorizes the Collector, under certain conditions, to "sell by auction the *patti* or *mahál* in respect of which such arrear is due," and s. 167 provides that "land sold under the last preceding section shall be sold free of all incumbrances, and all grants and contracts previously made by any person other than the purchaser in respect of such land shall become void as against the purchaser at the auction sale." The second class of sales to which clause (*h*) of s. 150 relates is provided for by s. 168 which runs as follows :—

"If the arrear cannot be recovered by any of the above processes, and the defaulter owns any other *mahál* or any share in any other *mahál* or any other immovable property, the Collector of the District may proceed against such *mahál* or other immovable property as if it were the land on account of which the revenue is due, under the provisions of this Act :—

Provided that no other interests save those of the defaulter alone shall be so proceeded against, and no incumbrances created, or contracts entered into by him in good faith, shall be rendered invalid by such proceeding."

We are directly concerned with this section in this case, as it was admitted in the course of the argument that the auction sale of the 20th August 1886, was not such as s. 166 of the Act contemplates, and it must therefore have been held under s. 168. This being so, it is important to notice: *first*, that the section contemplates sale of "*any share* in any other *mahál*," that is, any fractional share, and, *secondly*, that "no other interests save those of the defaulter alone" can pass by such sale.

Sections 169 to 187 lay down various rules as to the manner in which sales by auction are to be held and the purchase money is to be deposited and other similar matters, and then comes s. 188 under which pre-emption is claimed in this case. The section requires close consideration, as its provisions are the solitary ground of the plaintiff's right of pre-emption, and, as I have shown at the outset, if the case falls beyond the exact scope and purview of that section the claim for pre-emption must necessarily fail, as no other statutory authority is relied upon, and the general law of pre-emption will not apply to compulsory sales. The section runs as follows :—

"Where any land sold under s. 166 is a *patti* of a *mahál*, any recorded co-sharer, not being himself in arrear with regard to such land, may, if the lot has been knocked down to a stranger, claim to take the said land at the sum last bid : provided that the said demand of pre-emption be made on the day of sale and before the officer conducting the sale has left the office for the day, and provided that the claimant fulfil all the other conditions of the sale."

In regard to the interpretation of this section the argument on behalf of the defendant-appellant, Baijnath, may be analyzed under three heads, namely :

(1) that the pre-emption provided by the section applies only to sales under s. 166 and not to sales under s. 168 such as the sale in this case.

(2) that it applies only to sale of a whole *patti* of a *mahál* and not to a fractional share of a *patti*, as the share of Lala Singh which was sold on the 20th August 1886, in respect of which pre-emption is claimed.

(3) that the plaintiff-respondent, Sital Singh, being a sharer of another *patti* cannot be regarded as a "recorded co-sharer" within the meaning of the section so as to entitle him to pre-emption.

Now in regard to the first of these points, it is true that the section 188 mentions only sales under s. 166 and the right of pre-emption would at first sight appear to be limited to such

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sales only, but s. 168, whilst authorizing the sale of "any share in any other *mahál*," distinctly provides that such share is to be sold "as if it were the land on account of which the revenue is due, under the provisions of this Act." I am of opinion that, inasmuch as s. 166 is the only provision in this behalf, these words render all the incidents of sales under s. 166, including pre-emption, applicable also to sales under s. 168, with the exception of what is provided in the proviso, namely, that only the defaulter's interest passes, "and no incumbrances created or contracts entered into by him in good faith shall be rendered invalid by such proceedings," as would have been the case under s. 166, if the body of the section had been allowed to stand without the proviso. The proviso cannot be regarded as a surplusage, and it could be required only if the body of the section imported all the incidents and rules relating to sales under s. 166, which, according to my opinion, it does. I therefore hold that the pre-emption provided by s. 188 applies also to sales under s. 168. The case of *Narain Singh* v. *Muhammad Faruk* (1) is not opposed to this view, because all that that ruling specifically laid down was that the provisions of s. 14 of Act XXIII of 1861 as to the right of pre-emption were limited to sales in execution of Civil Courts' decrees and could not be extended to sales in execution of decrees passed by the Revenue Courts; and the learned Judges, before expressing any view as to the point now under consideration, began by saying that "if the present Rent Act admits of the assertion of a pre-emptive title in cases of sale in execution of decrees, the suit should have been founded on some section in that Act," and they then, without deciding the question, expressed their inclination to be that the effect of s 177 of the Rent Act, read with s. 188 of the Revenue Act, was to give a right of pre-emption in respect of sales in execution of decrees of the Revenue Courts So far therefore the dictum of the learned Judges is entirely in favor of my view, and the judgment shows that they refrained from actually ruling it, because they were of opinion that the phrase "a *patti* of a *mahál*" as it occurs in s. 188 means only an entire *patti* and not a part only of a *patti* of a *mahál*.

(1) I. L. R., 1 All., 277.

This leads me to the second point as to the interpretation of s. 188, for, upon the strength of the ruling which I have first cited, it has been argued that since the share of Lala Singh sold by auction on the 20th August 1886 was only 1 biswa 2 biswansis 5 kachwansis in *patti* III, and did not constitute the whole *patti*, no right of pre-emption under the section could accrue either in favor of the co-sharers of the same *patti*, such as Bhoja Singh the other plaintiff, (appellant in the connected S. A. No. 998 of 1888), or in favor of the co-sharers of the other *pattis*, such as Sital Singh, plaintiff-respondent in this appeal. In order to deal with this contention it is necessary, before deciding whether I am prepared to accept the ruling cited, to determine the exact meaning of the word *patti* as it occurs in s. 188 of the Revenue Act (XIX of 1873).

Now it is no doubt a somewhat regrettable circumstance that that enactment, whilst defining the word "*mahál*" in s. 3, omits to define the word "*patti*," which, as will presently appear, is most important for the purposes of this case. Nor does the Rent Act (XII of 1881) define the term, and the omission is all the more regrettable, because the word does not belong to the language in which these two enactments have been framed. It must therefore be taken that the Legislature intended to leave the word to its natural signification in Hindustani, to which language it belongs, and to be understood in the sense in which it was understood before these two enactments were passed.

This being so, it is necessary to consider the history of the word as a term of the land revenue system. Mr. Justice Field in his learned Introduction to the Bengal Regulations (p. 48) gives an account of the meaning and use of the word. He says:—"The village system as previously described was in existence in the Upper Provinces when they came under our dominion. Under that system the proprietors or *village zamíndárs* were in general so numerous a body that a settlement with them all would have been highly inconvenient. We therefore continued a practice which existed before our time of selecting one amongst the sharers whose name was entered in the public accounts as the person responsible for the

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collection and payment of the revenue. The proprietor who is thus a party in his own name to the contract with Government for the payment of the revenue is called the *sadar malguzar* or *lambardar*, while the co-sharers or proprietors who are not parties in their own names are called *pattidars*". The learned author then in a foot-note explains the meaning of the term. "*Patti* is a share, one of the many shares into which the village has been split up by the operation of the laws of inheritance, &c. *Pattidar* means any holder of a share, but has in practice been limited as above. In a *mukammal*, or perfect *pattidari* tenure the lands are held in severalty by the proprietors who are all jointly responsible for the revenue. In a *namukammal*, or imperfect *pattidari* tenure, part of the land is held in common, and the profits of this go first to meet the revenue and the remaining part is held in severalty. When one of the co-sharers fails to pay his quota the others have to make it good."

This explanation is inconsistent with the definition of the phrase "*pattidari estate*" in s. 2 of Act I of 1841, which runs as follows:—"A *pattidari* estate in this Act is held to be an estate which consists of two or more separate portions or *pattis*, or of which there may be proprietors possessed of separate properties and holding direct of the Government but not parties in their own names to the contract with the Government for payment of the public revenue. The proprietor who is a party in his own name is called a *lambardar*, and the proprietor who is not a party in his own name is called a *pattidar*."

This section as relating to the tenures in these provinces is best explained in the authorized Directions for Settlement Officers (p. 50) published by the authority of the Local Government in 1858. The work says:—"*Pattidari* tenures are those in which the lands are divided and held in severalty by the different proprietors, each of such persons managing his own lands, and paying his fixed share of the Government revenue, the whole being jointly responsible in the event of any one sharer being unable to fulfil his engagements. Imperfect *pattidari* tenures are those in which part of the land is

held in common and part in severalty; the profits from the land in common being first appropriated to payment of the Government Revenue and the village expenses, and the overplus being distributed or the deficiency made up, according to a rate (or *bachh*) on the several holdings."

In the present case it is admitted that the tenure of the village in which the share of Lala Singh sold is situate is an imperfect *pattidari* and that he was therefore a *pattidar*. The word occurs in s. 10 of Regulation XXVII of 1795, and it is used there in its natural sense as a convertible term with the English word "sharer" employed with reference to a sharer in a *pattidari mahál*. There being nothing to the contrary in the Act itself, or elsewhere, I hold that a broad and general meaning consistent and co-extensive with its meaning in the Hindustani language should be assigned to the word "*patti*" as it occurs in s. 188 of the Revenue Act, and that "*patti*" must be taken to mean the share of a *pattidar*. This interpretation is not inconsistent with the definition of *pattidar* in s. 2 of Act I of 1841, of which enactment s. 4 provided the right of pre-emption, (in respect of auction-sale of any *patti*) in favor of "any *pattidar* or other member of the co-parcenary, not being himself in arrear." The manner in which this provision is understood by the revenue authorities in connection with pre-emption is described in the authoritative "Directions for Revenue Officers" (at p. 249) where it says:—"In co-parcenary estates a right of pre-emption generally exists on the part of such co-parcener in the event of the sale of a share. Provision is made for the enforcement of this right by s. 4, Act I of 1841, on the occasion of the sale of any *patti* by public auction for arrears of revenue, and by the 8th rule promulgated by the Court of *Sudder Dewanny Adawlut*, under s. 11, Act IV of 1846, on the occasion of the sale of the right and interests of a co-parcener in satisfaction of a decree of Court."

But it is contended that the word "*patti*" can never mean the share of a *pattidar*, because in clauses (*d*) and (*e*) of s. 150 of the Land Revenue Act (XIX of 1873), as also in ss. 154 and 157,

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the words "*patti*" and "share" are used as indicating a marked distinction between them, and that that distinction is all the more apparent when it is observed that in clauses (*f*) and (*g*) of s. 150 and the corresponding ss. 158 and 166 the word "*patti*" only occurs to the exclusion of the word "share," in respect of the power of annulment of the settlement and sale of the *patti* in respect of which the arrear is due. The distinction is no doubt noticeable, but the context of the clauses above-mentioned shews that the distinction may have been intended only to differentiate between the share of a *zamíndári* estate and a *patti* which is a portion of a *pattidari* estate. The distinction might refer to the nature of the tenure, that is to the difference between *zamíndári* estates and *pattidari* estates, and I do not think it need necessarily be understood to mean that the holding of a *pattidar*, who by reason of the very nature of the tenure holds his land separately, is not a *patti*, though speaking literally the holding is a *share* of the *mahál* in which it is situate. But it is further contended that a sale of a share of a *patti* never takes place for arrears of Government revenue. This contention is based upon drawing a hard and fast distinction between the meaning of the word "*patti*" and "share" which, as I have explained, are literally and virtually convertible terms for all practical purposes where *pattidari* estates are concerned, and there is no reason shown why, for purposes of pre-emption, the rules which apply to the sale of the one should not apply to the sale of the other. Moreover, whilst it is true that as a matter of practice and convenience revenue authorities do not ordinarily sell the share of a *pattidar* by itself by the summary executive process for recovery of revenue, it is an ordinary occurrence that such share is, as a matter of fact, brought to sale in execution of a revenue Court's decree, and Messrs. Crosthwaite and Smeaton, in their note on s. 166 of the Revenue Act, say that this takes place in nine cases out of ten. We know that this responsibility for payment of revenue by co-parcenary *pattidars* is of a joint character, and arrears due by any one of them can be recovered by sale of the shares of all. In view of this circumstance when a *pattidar* makes default in payment of his *quota* of the revenue his *co-pattidars* pay up his *quota* of

revenue, and then sue him in the Revenue Court under clause (*k*) of s. 93 of the Rent Act which provides for "suits by recorded co-sharers to recover from a recorded co-sharer who defaults arrears of Government revenue paid by them on his account." Decrees passed in such suits by the Revenue Court are executed by bringing to sale only the share of the defaulting *pattidar*, for it is clear that the shares of the other *pattidars* would not be liable to sale under such decrees. Such sales take place under s. 177 of the Rent Act, and there seems no reason in principle why a right of pre-emption should not accrue to the non-defaulting *pattidars*. The right of pre-emption is in its very essence a reciprocal right, available to such co-parcenary *pattidar* in respect of the *share* or *patti* of the other, and its object is to exclude strangers from the co-parcenary body. Now, applying this principle to the present case, it must be admitted that the *pattidar* Lala Singh whose share was sold could have exercised pre-emption by reason of his *pattidari* right, if the other *pattis* were sold; and it would be infringing the essential principle of pre-emption reciprocity if it were to be held that when his share is sold, as it was on the 20th August 1886, the other *pattidars* would have no right of pre-emption in their turn. I think we are not driven to any such interpretation of s 188 of the Revenue Act, and indeed, in my opinion, we should be defeating the policy of the statute as to the right of pre-emption if we adopt any interpretation which would have such an effect. The whole policy and object of the right of pre-emption is to prevent the intrusion of strangers in co-parcenary villages such as *pattidari* estates, and since it is conceded on all hands that the sale of an entire *patti* would give the right of pre-emption to the owners of other *pattis*, it seems to me to follow *a fortiori* that the sale of the lands of a *co-pattidar* should entitle his *co-pattidars* in the same *patti* to exercise pre-emption for the purpose of excluding strangers from that *patti*.

When I say that any interpretation other than that which I have adopted of the word "*patti*" as it occurs in s. 188 of the Revenue Act, would defeat the policy of the right of pre-emption itself

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as indicated by that section, I must not be understood to mean that such a result might not have followed if the word had been clearly defined in the statute itself, or indeed if any clear definition of it were capable of being gathered from the statute. Nor should I be taken to hold that, even if a precise definition of the word were to be found in the statue, it should not be interpreted in other parts of the statute in the same sense as it should be interpreted in s. 188. I have said enough to show that whilst the word *patti* did bear an intelligible and definite meaning under Act I of 1845, s. 2, and therefore also in s. 4 of that enactment, the Legislature has chosen to leave it undefined in passing the present Revenue Act. I confess, speaking for myself, that I have exceptional difficulty in understanding this word of my own language in a sense different from what it would have free of doubt had it not been appropriated by the Legislature in passing a law such as the Revenue Act. In so appropriating the word it might have been expected that the mere fact of its being a word alien to the English tongue, in which the enactment was framed, rendered it necessary that it should be specifically defined, so as to make it impossible for those whose duty it is to interpret the statute to have any doubt as to the meaning it bears in any one part of the enactment or another.

But, whilst saying this, I cannot help feeling that the interpretation which I have placed on the word *patti* as meaning the share of a *pattidar*, whether he owns a whole *patti* or not, is an interpretation which cannot be adopted in exactly the same broad sense in some parts of s. 150 of the Revenue Act as in s. 188 of the same enactment. It seems to me clear, for the reasons stated by Messrs. Crosthwaite and Smeaton in their edition of the Revenue Act at page 167, that the word *patti* as it occurs in clause (*f*) of s. 150 with reference to annulment of the settlement, and as it occurs in clause (*g*) with reference to sale of such *patti* under conditions such as s. 166 requires must necessarily mean the whole *patti*, that is to say, a proportionate share of the *mahál* with reference to the assessment of revenue. This, I think, may be conceded, because the word has not been used sufficiently carefully in the enactment to make it

bear only one and the same rigid, definite and precise meaning throughout the Act. The exigencies of the rules as to annulment of the settlement or sale in arrears of revenue require the limited interpretation of the word *patti* as meaning the whole *patti*; the exigencies of the right of pre-emption require that the same word in s. 188 should be broadly interpreted as meaning the share of a *pattidar*. There is no inconsistency in thus interpreting the word *patti* in a limited sense in one part of the statute and in a broad sense in another part of the same enactment, as I will presently explain.

It is undoubtedly a sound rule of interpreting statutes that words must be understood in their ordinary and natural meaning unless there is clear reason to the contrary. *Patti* is a Hindustani word, and in that language it means a share in a *pattidari* estate. For example, where there are five sharers the share of each is a *patti* and each sharer is a *pattidar*. If the Government, dealing with the settlement of revenue, chooses to deal with all the five in one engagement, that engagement will not, in the absence of express words to that effect, alter the meaning of the word *patti* or *pattidar*. The fact of the joint engagement of revenue may regulate the incidents of the engagements, for example that the engagement cannot be annulled with one *pattidar* unless the whole engagement is annulled. But this would not alter the fact that *patti* means the share of each of the five *pattidars* who joined in the engagement. This is the natural meaning of the word, and I so understand it in the absence of any express definition to the contrary.

As to this broad meaning being incapable of precise application to the powers of annulment of the settlement under clause (*f*) s. 150 read with s. 158, and the powers of sale under clause (*g*) of s. 150 read with s. 166 of the Revenue Act as to the sale of a *patti* in arrears of revenue I have little doubt. But the fact that a revenue officer desirous of collecting revenue by either of those processes is bound by the rules to put a restricted interpretation on the word *patti* by interpreting it to mean the whole *patti* does not necessitate my interpreting the word *patti* to mean that the share of a man who is admittedly a *pattidar* is not a *patti* in the sense in which I under-

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stand it in s. 188 of the Revenue Act for purposes of pre-emption. If a revenue officer cannot annul a settlement unless it is a *patti* including the whole area covered by the engagement to pay the revenue, it is not because the word *patti* necessarily and exclusively means that, but because the nature of the engagement with the Government for the payment of revenue, like a mortgage, necessitates that the breaking up of such an engagement must relate to the whole area. Similarly clause (*g*) of s. 150 read with s. 166 relates to cases where a revenue officer desirous of realizing the arrears of revenue cannot sell the share of any individual *pattidar* if that share falls short of what the revenue officer is bound to recognize as the area subject to the engagement for payment of revenue. This is so, not because the word *patti* means anything other than what it really does, *i.e.*, the share of a *pattidar*, but because, by reason of the provisions of s. 166 taken with the provisions of s. 167, which clear away prior incumbrances, no such sale can take place by the summary process without disturbing the whole engagement with all the *pattidars* who joined in the responsibility for payment of Government revenue. It is therefore in consequence of the exigencies of the engagement for payment of Government revenue that in clauses (*f*) and (*g*) of s. 150 and in the corresponding ss. 158 and 166 the word *patti* must be taken to mean the whole *patti*. No such reasons apply to sales under s. 168 which must be read with clause (*h*) of s. 150 of the Act.

Whilst I fully recognize the rule of interpretation that words, when they occur in one and the same statute, must, so far as possible be interpreted in exactly the same meaning, I regret I am differing with the majority of the Bench in holding that that rule of interpretation, which undoubtedly is a sound rule in ordinary cases, is not applicable to this case. I am driven to the conclusion that the interpretation of the word *patti* in s. 188 so as to exclude the share of a *pattidar* for the purpose of pre-emption would defeat the whole policy with which we must credit the Legislature in having framed that section with the special object of preventing the intrusion of strangers in *pattidari* estates.

As to the rule of interpretation that words in a statute should bear the same meaning throughout, unless something to the contrary is shown, I wish to say that it is far from being an inflexible rule and that it amounts only to a presumption for purposes of understanding the meaning of the Legislature. Mr. Maxwell in his work on the interpretation of statutes (at p. 385, 2nd ed.), referring to decided cases, states the rule in the following terms :—

"It has been justly remarked that when precision is required no safer rule can be followed than always to call the same thing by the same name. It is at all events reasonable to presume that the same meaning is intended for the same expression in every part of the Act. But the presumption is not of much weight."

The learned author supports this statement of the rule by illustrations furnished by decided cases, and his conclusions are similar to those arrived at by Mr. Wilberforce in his work on statute law from which I quote a passage (at pp. 135—6) :—

"As the literal meaning of words, and even their usual meaning, can thus be forsaken, it follows, as a necessary consequence, that the same word may have various meanings not only in different Acts of Parliament but sometimes in the same Act or in the same section. As a general rule the Courts 'endeavour to give the same meaning to the same words occurring in different parts of an Act of Parliament,' and it is said that 'if the Legislature have used an ambiguous word in a definite sense in one passage of a clause in an Act of Parliament, it is in accordance with the rules of sound construction and legitimate inference to hold the same word is used in the same sense when found in another passage of the same clause.' This, however, is not always possible. In one case the Court, in construing the 9th section of 3 and 4 Will. IV., Cap. 27, found that the word 'rent' occurred seven times in that section, and that in three of those instances it must be read in the sense of '*rent-charges*' in the other four instances in the sense of '*rent reserved.*'"

This passage is also supported by the authortity of decided cases, which show that the rule that a word used in a statute is to be

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understood in the same sense throughout, is only a rule of presumption, by no means inflexible, and certainly not of such a character as to be irrebuttable by other rules of interpretation founded upon the especial context of statutory words or reasons and objects wherefore any special section is enacted.

I have dealt upon the exact scope of this rule of interpretation because the point upon which my judgment in this case virtually turns is to show that, unless the word *patti* as it occurs in s. 188 of the Revenue Act is to be interpreted literally as including the share of any *pattidar* and in a sense different to, or rather, less restricted than, the sense in which it is used in s. 150, clauses (*f*) and (*g*) and in the corresponding ss. 158 and 166, s. 188 need never have been enacted. In other words I have come to the conclusion that in interpreting the word *patti* in s. 188 there exist enough reasons for interpreting the word in a sense other than that in which, speaking strictly, it occurs in some other parts of the Act.

Now s. 188 provides what? It provides no rule calculated to facilitate the recovery of arrears of revenue. There is not one word in that section which is intended to provide any special process for expediting the collection of revenue. It is also clear from the preamble of the Act that the scope of the enactment was "to consolidate and amend the law relating to land revenue and the jurisdiction of Revenue officers in the North-Western Provinces of the Presidency of Fort William in Bengal." There is not one word in that preamble which would suggest that the enactment was intended to create a right of pre-emption in connection with sales that may take place in collecting arrears of revenue.

This being so it is of considerable importance for understanding the section to notice that the Legislature, going beyond the exact purview of the enactment as specifically represented by the preamble, chose to frame a rule such as s. 188 contemplates. That rule, if it is to be understood in any sense of having an object in view, must be understood to mean that its aim and end is that in *pattidari* estates when sales take place in arrears of Government revenue, such sales should be made under conditions which give a chance to

other *pattidárs* of precluding the intrusion of strangers by paying up the amount of money represented by the last bid in a public auction sale. The protection of the integrity of *pattidari* estates from intrusion by strangers is not a part and parcel of the rules as to collection of revenue, and I say this with emphasis, because I attach to s. 188 an especial importance as representing an especial and definite policy of the Legislature, namely, that in *pattidári* estates the intrusion of strangers should be obviated.

I will now show by analogical illustration that if the word *patti* in s. 188 is to be understood in any inflexible or rigid sense so as to mean only the whole *patti*, and not a share of a *patti*, then it will be a necessary consequence that s 188 will be suicidal in itself, because the right of pre-emption which it provides will be easily defeated by the simple fact that the property brought to sale is not the whole *patti*, but only the share of a *pattidar*. The purchaser of such a share, however disliked he may be by the *co-pattidars* of the *pattidars* whose rights are sold, may intrude upon the coparcenary with impunity, and not only in the *patti* of which he has bought a share, but also thus acquire a pre-emptive right in other portions of the *mahál*. The case may be thus illustrated :—

Suppose that the words of s. 188 were to begin by saying "where any property sold under s. 166 is a *house*" the question would arise whether the sale of a portion of the house would imply that a right of pre-emption is enforcible in respect of such sale. The argument by which the word *patti* is interpreted in that section as meaning only the whole *patti*, when applied to the house would be this :—"When the whole house is sold then undoubtedly there is a right of pre-emption, but if a portion of the house is sold then there is no right of pre-emption for the co-sharers. A neighbour is entitled to sue when the whole house is sold to enforce his pre-emption but the sale of a portion of the house, whereby a stranger is introduced into the house, cannot be questioned by any pre-emptive claim by the co-sharers in the house itself."

That such would be the consequence of holding that the word *patti* as it occurs in s. 188 of the Revenue Act does not include the

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share of a *pattidar* is obvious. I cannot credit the Legislature with any such intention, as I believe, in framing s. 188 of the Revenue Act, they were only recognizing and showing consideration to the well-established custom of pre-emption in this part of the country. In short, I think that, whatever meaning is to be assigned to the word *patti* for purposes of considering the anulment of settlement or considering the question whether a *patti* cannot be executively brought to sale under s. 166, so as to defeat prior incumbrances; for purposes of interpreting s. 188 the word *patti* must include the share of a *pattidar*. I must repeat that I am driven to this conclusion, because otherwise the policy of the Legislature in framing s. 188 would be frustrated, as it would be repugnant to the very notion of pre-emption. So far as these views are in discord with the ruling of a Division Bench of this Court in *Narain Singh* v. *Muhammad Faruk* (1) respectfully dissent from it.

I now proceed to consider the case-law upon the subject, and in doing so I must premise what I have already pointed out that the provisions of s. 188 of the Revenue Act (XIX of 1873) are a reproduction of the rule as to pre-emption contained in s. 4 of Act I of 1841, and that by section 14 of Act XXIII of 1861 the rule was extended to auction sales in execution of Civil Courts' decrees. Whilst the law stood thus it was held by Morgan, C. J. and Spankie, J. in *Sheikh Kadir Bux* v. *Ram Tahul Bhagut* (2) following some earlier rulings of the Sadar Court, that a claim for pre-emption under s. 4 of Act I of 1841 applied equally to perfect and imperfect *pattidari* tenures, as they both fall under the purview of the definition of *pattidari* estate in s. 2, of that Act. Even a stronger case is the ruling of Pearson and Brodhurst, JJ., in *Ram Autar* v. *Sheo Dutt* (3) where there had been no public partition, but it appeared from the settlement *wajib-ul-arz* that the lands in the *mauza* were held in the following manner, that is to say, the co-sharers had divided them into *pattis*, and each *pattidar* realized the rents or proceeds of his own separate holding, and his share of the rent of the common lands, and paid his own *quota* of revenue separately, it

(1) I. L. R., 1 All., 277. (2) N.-W. P. H. C. Rep., 1871, p. 125.
(3) N.-W. P. H. C Rep, 1874, p. 243.

was held that the tenure came within the definition of a *pattidari* estate contained in s. 2 of Act I of 1841, and a share in the *mauza* having been put up for sale in the execution of a decree and knocked down to the defendant, a stranger, the plaintiff, a co-sharer of the share, was held to be entitled, under the provisions of s. 14 of Act XXIII of 1861, to take the share.

These cases are clear authorities for the proposition that the mere fact of a *pattidar's* share being situate in an imperfect *pattidari* estate did not preclude pre-emption in respect of the sale of such share under s. 4 of Act I of 1841, and I see nothing in the corresponding s. 188 of the present Revenue Act (XIX of 1873) to require any other interpretation.

As to the third point I am of opinion that the phrase "any recorded co-sharer" as it occurs in s. 188 of the Revenue Act means any *pattidar*, that is, the holder of a share in a *pattidari* estate or *mahál*, and that therefore the plaintiff-respondent, Sital Singh, was entitled to the right of pre-emption along with the other *pattidars*, there being no such restrictive words in the section as would exclude a person in his position.

The third ground of appeal in this case, namely, that since the lower appellate Court has found that one of the plaintiffs, Bhoja Singh, was not entitled to pre-emption, it should also have held that the plaintiff-respondent, Sital Singh, had also forfeited his right of pre-emption by joining the aforesaid Bhoja Singh as plaintiff in the suit is also the turning point of the ground taken by Bhoja Singh in his connected second appeal, No. 998 of 1888, in which he contests the validity of the lower appellate Court's finding in this respect; so far, therefore, both these appeals may be considered together.

It has been argued on behalf of the defendant Baijnath, who is respondent in Bhoja Singh's appeal, (No. 998 of 1888) that since Bhoja Singh was a co-sharer of the same *patti* as Lala Singh whose share was sold on the 20th August 1888, his proper course was to have prevented that sale by paying up the money due by Lala Singh in respect of which the Revenue Court's decree was passed against the latter, and that he, having omitted to do so, must be taken to be

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himself a defaulter so as to disentitle him from the benefits of s. 188 of the Revenue Act. This indeed is the view adopted by the lower appellate Court as the ground for dismissing his claim, but it is thoroughly unsound. In the first place it was not pleaded and it does not appear, that Bhoja Singh was himself in arrear of revenue with regard to the land sold, and in the next place, as I have shown, the sale must be understood to have taken place under s. 177 of the Rent Act read with section 168 of the Revenue Act, sales under which must necessarily be limited to the interest of the defaulter Lala Singh, and could in no sense have imperilled the rights and interests of Bhoja Singh, thus rendering it unnecessary for him to make any payment to obviate the sale. As a *pattidar* Bhoja Singh was entitled, like Sital Singh, to the right of pre-emption in respect of the sale of the 20th August 1886, and there was nothing irregular or improper in their having joined in bringing the suit to enforce the pre-emptive right which was common to them both. This view renders it unnecessary for me to consider how far the rule laid down in *Bhawani Prasad* v. *Damru* (1) and *Karan Singh* v. *Muhammad Ismail Khan* (2) that the joinder of a stranger by a pre-emptor in suing for pre-emption defeats the entire pre-emptive rights can be applicable to a case such as this where the claim for pre-emption is based upon the statutory provisions of s. 188 of the Revenue Act.

As the result of this judgment I would dismiss this appeal, and, setting aside the decrees of the lower Courts, so far as they dismiss the claim of Bhoja Singh, decree his appeal (S. A. 998 of 1888) with the effect that the whole suit as brought would stand decreed with costs in all the Courts.

EDGE, C. J —In the view which I take of sections 166, 168 and 188 of Act XIX of 1873, it is not necessary for me to express in this case any opinion as to the effect of s. 177 of Act XII of 1881, or on the various other points discussed by my brother Mahmood.

In my opinion we must apply here the rule of construction which is applicable generally to statutes and Acts of the Legisla-

(1) I. L. R., 5 All., 197. (2) I. R., 7 All., 860.

ture, that is, we must construe a word which occurs more than once in the same Act so as to give it the same meaning throughout the Act, unless some definition in the Act or the context shows that the Legislature used the word in different senses.

If the Legislature by "*patti*" as used in ss. 166 and 188 of Act XIX of 1873 meant the share of a *pattidar* in a *patti* and not a division of a *mahál*, it appears to me that the Legislature used the word "*patti*" in two different senses in the Act. In s. 150 clause (*d*) a distinction is made between a "share" and a "*patti*" and a "*mahál*." In clause (*e*) of that section a distinction is made between a "share" and a "*patti*." Clause (*f*) of s. 150 relates to "the annulment of the settlement of such *patti* or of the whole *mahál*," clause (*g*) to a "sale of such a *patti* or of the whole *mahál*" and clause (*h*) to a "sale of other immovable property of the defaulter." The "other immovable property of the defaulter" in clause (*h*) must be immovable property other than "the share, or *patti*, or *mahál* in respect of which the arrear is due" mentioned in clause (*d*), and consequently other than "such share or *patti*" mentioned in clause (*e*) and other than "such *patti*" or the "whole *mahál*" mentioned in clauses (*f*) and (*g*).

The "processes" respectively prescribed in clauses (*a*) to (*h*) inclusive of s. 150, by which an arrear of revenue may be recovered are separately developed and provided for in the subsequent sections of the Act, and are not in those sections confused one with the other. As, for example, the process "by attachment of the share, or *patti*, or *mahál*, in respect of which the arrear is due" mentioned in clause (*d*) of s. 150 is dealt with in ss. 154, 155 and 156. Again the process "by transfer of such share, or *patti*, to a solvent co-sharer in the *mahál*" mentioned in clause (*e*) of s. 150 is dealt with in s. 157. Again the process "by annulment of the settlement of such *patti*, or of the whole *mahál*" mentioned in clause (*f*) of s. 150 is dealt with in ss. 158 and 159. Ss. 160 to 165 inclusive further relate to some of the above-mentioned processes. The process "by sale of such *patti*, or of the whole *mahál*" mentioned in clause (*g*) of s. 150 is dealt with in s. 166; s. 167 enacting what shall be the effect of a sale under s. 166. The process "by sale of other immovable

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property of the defaulter" mentioned in clause (*h*) of s. 150 is separately dealt with in s. 168. Ss. 169 to 187 inclusive relate to procedure, re-sales, the application of proceeds of sales, the liability of a purchaser and other matters not necessary to refer to here. There is nothing to suggest that the word "*pátti*" in s. 166 has been used in any other sense than that in which it has been used in clauses (*d*) (*e*) (*f*) and (*g*) of s. 150 when it is used as meaning something other than a share of a defaulting share-holder or *pattidar* in the *patti*. It appears to me that, in whatever sense the word "*patti*" is used in s. 166, the same meaning, and that only, must be applied to it as it is used in s. 188 which enacts that "when any land sold under s. 166 is a *patti* of a *mahál* any recorded co-sharer may, &c." It will be remembered that what may be sold under s. 166 is the *patti* or *mahál* in respect of which such arrear is due and not the share of a defaulting shareholder or *pattidar* in the *patti*.

A sale under s. 166 of Act XIX of 1873 can only be resorted to "if the arrear cannot be recovered by any of the above processes," amongst which is the process of a sale of "the *patti* or *mahál* in respect of which such arrear is due" authorized by s. 166. I cannot read s. 188 of the Act as applying to a sale under s. 168.

For the above reasons, whatever may be the construction of s. 177 of Act XII of 1881, I am of opinion that s. 188 of Act XIX of 1873 cannot apply in this case in which the property sold was not a *patti* of a *mahal* within the meaning of that section.

It was not suggested by the learned vakil who represented the respondent before me that there was any right of pre-emption if s. 188 of Act XIX of 1873 did not apply.

I would allow the appeal of Baij Nath, defendant, with costs and dismiss the suit with costs.

YOUNG, J.—This was a suit for pre-emption of the share of a *pattidar* in an imperfect *pattidari* estate, such share having been sold at auction in execution of a decree of a Rent Court.

The points for decision in this case appear to be the following. Where a decree under the Rent Act (XII of 1881) has been passed

against the owner of a share in an imperfect *pattidari* estate and execution of such decree has been had by sale of the defaulter's share in the *mahál* (not being the property on which the arrear accrued) does the right of pre-emption accrue—

(1) to a co-sharer in the same *patti*?

(2) to a co-sharer in another *patti* of the same *mahál*?

The law as to execution of decrees of Rent Courts provides (Act XII of 1881, s. 177) that "the Board" may order the property to be sold, "in which case the sale shall be made under the rules in force for the sale of land for arrears of revenue but without prejudice to the incumbrances (if any) to which such property may be subject."

I think the expression "the rules in force for the sale of land for arrears of revenue" must be taken in its most comprehensive sense and is probably wide enough to include within its scope the rule allowing the exercise of the right of pre-emption at such sales under certain circumstances.

What then are the circumstances under which a right of pre-emption arises in a sale for arrears of revenue?

Under s. 166 of the Land Revenue Act (XIX of 1873) the Collector may, with the sanction of the Board, sell by auction "the *patti* or *mahál* in respect of which such arrear is due." The next section (s. 167) enacts that land so sold is sold "free of all incumbrances." S. 168 enacts that if the arrear cannot be recovered by any of the processes previously mentioned "and the defaulter owns any other *mahál* or any share in any other *mahál* or any other immovable property" the Collector "may proceed against such *mahál* or other immovable property as if it were the land on account of which the revenue is due under the provisions of this Act."

The rule allowing the pre-emption is contained in s. 188 of the same Act which runs as follows:—

"When any land sold under s. 166 is a *patti* of a *mahál* any recorded co-sharer, not being himself in arrear with regard to such land, may, if the lot has been knocked down to a stranger, claim to

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take the said land at the sum last bid." S. 168 extends these provisions to any *mahál*, share, or immovable property other than that on which the arrear accrued; but only authorizes sale of the defaulter's right and title therein saving incumbrances.

It is admitted that the village of Musafirpur consists of three "*pattis*"—

Patti	(I)	containing	6	bis. 13½	biswansis.
„	(II)	„	6	„ 13½	„
„	(III)	„	6	„ 13½	„
			20 biswas.		

It is further admitted that the tenure of the village is "Imperfect *pattidari*." In *patti* (III) Lala Singh held a share of 1 biswa 2 biswansis 5 kachwansis. We are not informed whether this share was held by him in distinct severalty or conjointly with other co-sharers in *patti* No. III, but in any case this share was sold at auction on the 20th August 1886, in execution of a decree of a Rent Court, under s. 177 of Act XII of 1881, and s. 168 of Act XIX of 1873 (apparently).

It will be remembered that such sale being in execution of a Rent Court's decree, does not prejudice the rights (if any) of previous incumbrancers, and in this respect differs from a sale under s. 166 of the Land Revenue Act (XIX of 1873), and agrees with a sale under s. 168 of that Act.

The question now before us is—does Lala Singh's *share* (assuming it to be a separate share) of 1 biswa 2 biswansis 5 kachwansis in the third *patti* of mauza Musafirpur come within the meaning of the expression "*patti* of a *mahál*" in s. 188 of Act XIX of 1873. Bearing in mind that Musafirpur is an imperfect *pattidari* village, I think the answer must be in the negative. For even if 1 biswa 2 biswansis 5 kachwansis could perfectly be called a *patti*, or the *patti* of Lala Singh, it would be the *patti* of a *patti* and the language of s. 188 ought to run—"When any land, &c., &c., is a *patti* of a *mahál* or the *patti* of a *patti* of a *mahál*." Does the language

of the Land Revenue Act really justify such an interpretation? If the property to be sold had been either of the three great *pattis* into which this village is divided, then the language of s. 188 would clearly be accurate, such a sale would be "the sale of a *patti* of a *mahál*." In the present case however we are asked to interpret the words *patti* "of a *mahál*" to mean "*patti* or part of a *patti* of a *mahál*."

But it was contended that in a *pattidari* village (perfect or imperfect *pattidari*) the word *patti* also meant the holding of any of the *pattidars* and therefore Lala Singh's share of 1 biswa 2 biswansis 5 kachwansis might be called his *patti*, he being a *pattidar*. To this it was replied, firstly, that in that case the Urdu word *patti* was used ambiguously in the Act to mean two things, and secondly, that in its second sense the word is simply equivalent to share, and that if the Legislature had meant to include a *pattidar's* share in the words "*patti* of a *mahál*" in s. 188, Act XIX of 1873, it could and would have said so, just as it does speak of "any share in any other *mahál*" in s. 168 of Act XIX of 1873.

Again s. 150 of Act XIX of 1873 specifies the various remedies to be had against revenue defaulters. It provides eight processes for enforcement of the Government demand. Some of these deal with the share of a defaulter, some with the *patti* or *mahál* in respect of which the arrear accrued.

The section draws a sharp distinction between the words *mahál*, *patti*, share, and this corroborates me in the opinion that the words "*patti* of a *mahál*" in s. 188 are not intended to include the share of a co-sharer in a *patti* of an imperfect *pattidari mahál*.

If the village had been a perfect *pattidari* one, so that Lala Singh's share might have been held entirely in severalty without any share of the joint lands; then "*patti*" might have included Lala Singh's share, though, even then, the language of the Act could not be regarded as free from ambiguity. But where the village is one of *zamíndári* tenure or of imperfect *pattidari* (as here) the word *patti* cannot be treated as synonymous with share. In conclusion I may briefly point out that a sale under s. 168 is merely

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a sale of the defaulter's right, title and interest, and does not pass a title clear from prior incumbrances. It may well be that this consideration influenced the Legislature in omitting to allow a right of pre-emption in sales under s. 168.

In my opinion s. 188 of Act XIX of 1873 has no applicability to sales under s. 168 of that Act.

On these grounds I would disallow the claim of Sital to pre-emption and would decree the appeal of the purchaser Baijnath with costs.

Appeal decreed.

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November 7.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Mahmood.

BASDEO (PLAINTIFF) *v.* GHARIB DAS (DEFENDANT).*

Hindu Law—Succession to the "gaddi" of a temple—Nature of evidence required to prove title to succeed—Explanation of terms "nihang" and "grihast."

Per EDGE, C. J. and MAHMOOD, J.—The question who is entitled to succeed to the office of a deceased *Mahant* must be decided in each case upon the evidence as to the customs relating to succession observed by the particular sect to which the deceased *Mahant* belonged. It is necessary for the person claiming a right to succeed as *Mahant* to establish that right by satisfactory evidence. He cannot derive any advantage from the weakness of his opponent's title.

Per MAHMOOD, J.—It was necessary for the plaintiff in this case to prove that he was "*Nihang*," as distinguished from "*Grihast*," which he failed to do. Meaning of the terms "*Nihang*" and "*Grihast*" explained.

Genda Puri v. *Chhatar Puri* referred to (1).

THE facts of this case sufficiently appear from the judgment of Edge, C. J.

Mr. *C. H. Hill* and Pandit *Sundar Lal*, for the appellant.

Mr. *T. Conlan* and Babu *Sirish Chandar Bose*, for the respondent.

EDGE, C. J.—This appeal arises out of a suit that has been heard and determined by the Subordinate Judge of Meerut, in which he dismissed the suit with costs. The plaintiff brought his suit to

* First appeal No. 28 of 1890 from a decree of Babu Piari Lal, Subordinate Judge of Meerut, dated the 3rd December 1888.

(1) L. R. 13 I. A. 105.

recover possession of a certain property attached to the *gaddi* of Baksar. He alleged that, according to the custom which governed the succession, he was the person lawfully entitled to the *gaddi* and to the title of *Mahant*, and, as such, to the property in suit. The custom which he alleged was that the *Mahant* for the time being had the power, without consultation with or interference by any one, to appoint his successor. His case was that he was so appointed by the deceased *Mahant* Ganga Prasad who died on the 26th February 1887. The plaintiff also alleged that the defendant had taken possession of the property attached to the *gaddi* and kept him, the plaintiff, out of possession of it.

On the other hand, the defendant, by his written statement, denied that the plaintiff had been nominated by Ganga Prasad as his successor; he alleged that the plaintiff was a married man and as such incompetent as a candidate for nomination; and he went on to allege that he himself had been appointed to succeed Ganga Prasad, and that such appointment was made with the consent of the *Mandaldhari Mahants*, and that he had been invested by Ganga Prasad with the cap and necklace, and that he had performed the obsequies of Ganga Prasad, and in paragraph 5 he in fact traversed the custom alleged by the plaintiff. He therein says:—"Succession to the *gaddi* depends upon the consent of the *Panchayati Mahants* and very exalted *Mandaldhari Mahants* so that the plaintiff has no right to get the property, nor is there any cause of action for the present suit." There were other questions raised in the written statement which it is not necessary, in the view that I take of the case, further to refer to.

Now the position is this:—The plaintiff claims a decree to eject the defendant from the property in suit. Admittedly the plaintiff never was in possession; and, admittedly, immediately after the death of Ganga Prasad, the defendant took possession and has continued in possession down to the present time. Under those circumstances it is for the plaintiff to prove a title which entitles him to have the defendant ejected from the property and to get possession of the property himself.

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We have been referred to no case which is precisely in point. I mean by that, no case in which the question as to how the succession to the *gaddi* of a monastery of this particular persuasion of *Nanakshahis* has been decided. So far as we know, that is a question which has never been legally decided. We are bound, therefore, to see whether any custom has been proved, which would, on the facts as to nomination alleged by the plaintiff, if we were satisfied with his evidence as to the nomination, entitle him to a decree. The law as laid down by their Lordships of the Privy Council in the case of *Genda Puri* v. *Chhatar Puri* (1) applies in our opinion generally to this case.

I propose to refer to the evidence of the witnesses called on behalf of the plaintiff, to whose evidence our attention has been called by his counsel and vakil. There may have been other witnesses called on his behalf in the Court below whose evidence the plaintiff did not consider it necessary to translate or print, and whose evidence certainly has not been relied upon in the course of the argument of this case.

[The remaining portion of the judgment of Edge, C. J., has not been reported here as it deals exclusively with the effect of the evidence in the case. The conclusion arrived at was that the plaintiff-appellant, on the evidence adduced by him, had failed to prove his title and the appeal should be dismissed—W. K. P.]

MAHMOOD, J.—I agree so entirely in the estimate of the evidence which the learned Chief Justice has expressed in his judgment, that it is not necessary for me to say anything more than this, that on all points connected with the question of *onus probandi*, the proof of title rested with the plaintiff. I concur with him also in holding that the plaintiff has failed to prove his own case. The learned Chief Justice has already referred to the case of *Genda Puri* v. *Chhatar Puri* (1) and out of the judgment of their Lordships of the Privy Council I wish only to read two short passages at pages 105 and 106. The passage says :—" In determining who is entitled to succeed as *Mahant* in such a case as the present the only law to

(1) L. R., 13 I. A., 105.

be observed is to be found in custom and practice, which must be proved by testimony, and the claimant must show that he is entitled according to custom to recover the office and the land and property belonging to it. This has been laid down by this committee in several cases. The infirmity of the title of the defendant, who is in possession, will not help the plaintiff, as the Subordinate Judge seems to have thought."

In this case when I was listening to the learned argument addressed to us by Mr. *Hill*, the learned counsel for the plaintiff-appellant, I confess I did feel that there may have been as great a difficulty as the learned counsel imagined in the title of the defendant. However, I felt exactly as the learned Chief Justice has now represented in his judgment, that it is for the plaintiff to prove his title, be the title of the defendant as feeble as possible. This is all I wish to say as to the reason of my concurrence in the judgment of the learned Chief Justice.

There is, however, one matter upon which I wish to express a few words, and this is that I take it that both Mr. *Hill* on behalf of the plaintiff-appellant, and Mr. *Conlan* on behalf of the defendant-respondent concede, as common ground between them, that in order to qualify a *Chela* to succeed to the deceased *Ganga Prasad*, it was necessary that the successor should be *Nihang*, as distinguished from *Grihast*. His Lordship the Chief Justice has rightly observed that the exact distinction between these two terms is not necessary matter for decision for the purposes of this case. I do feel that myself; but I may say that, whilst fully concurring with that, I have no doubt (even after having heard the learned philological argument addressed to us by Pandit *Sundar Lal* in his reply on behalf of the plaintiff-appellant) that *Grihast* means a householder, that celibacy for purposes of the definition of *Nihang* is only a part of the qualification, a part of the signification, of the term. The word *Nihang* according to Shakespear's dictionary at p. 2099 means:—"Naked, free from care." I must then remember also what Fallon in his well known dictionary says as to the meaning of the word *Grihast*, from which the word *Grihasti* is derived by the

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addition of the appendix „i." It means domestic or worldly affairs; and, as is usual with this learned author, he cites a well known Hindi proverb showing what in common parlance the word meant in the language of the country. This proverb is:— *Joga asan Grihast kathin*; Easy a holy friar to be, hard house affairs and husbandry.

I have absolutely no doubt that the translation of the word *Grihast* as given above is in accordance with the manner in which the word is used in the language of the country, and it does not necessarily mean a married man, nor is it limited to the fact of the taking place of any marriage ceremony legitimate or illegitimate. It means a householder at large; it means a householder as distinguished from a wanderer; an *Arya* from a *nomad*. It is important to know that a person who is a *Grihast* can never be a *Nihang* according to the proper signification of these terms.

The proverb quoted above has especial application here, because on the evidence in this case it clearly follows that the plaintiff was not a wanderer on the face of the world in order to be a *Nihang*, but he was a householder. It has been attempted to be shown that he was a married man; that he was keeping a woman. That evidence I do not attach any importance to; still there is enough to show that he was not a *Nihang*.

One word more as to the word *Grihast*, and I refer to the dictionary of Shakespear again at page 1700 where he says:— "*Grihast* means a householder, a man of the second order, or he who, after having finished his studies and been invested with the sacred thread, performs the duties of the master of a house and father of family; a peasant; a husbandman."

It must be clearly understood that the meaning of the word is somewhat similar to the Roman expression *pater familias*. In order to be *pater familias*, it is enough to be the head of a family, to be the manager of affairs in the household, and by analogy this is all that the Hindu law means by the word *Grihasti*, notwithstanding the contention of Pandit *Sundar Lal* who drew my attention to

Chapter 8 of *Manu Smriti*. It is needless for me to dwell upon that chapter, but I have no doubt that there is nothing there either as to the meaning of the word *Nihang*, or as to the signification of the term *Grihasti*.

Holding these views then as I do, *viz.*, that the plaintiff has failed to prove that he is a *Nihang*, but that he is a *Grihast*, I have nothing more to say than that I entirely agree in all that the learned Chief Justice has said upon the evidence, and the decree which his Lordship has made in the case.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

MURTAZAI BIBI AND ANOTHER (DEFENDANTS) *v.* JUMNA BIBI AND OTHERS (PLAINTIFFS.) *

1890. *December* 8.

Muhammadan law—Wakf—Construction of document.

Where a Muhammadan of the Shia sect executed a document purporting to come into operation after his death, which document provided in a most complete manner of the devolution of his property, with the intention apparently of preserving the estate in perpetuity intact under the headship of some male member of the family, with provision by way of allowances for the other members, and of maintaining the dignity of the *riasat*, and in which no express mention of any sort of dedication of the property to charitable purposes was made, though there was some incidental reference to certain religious duties.

Held that such a document could not be construed as creating a *wakf*. Though it was not impossible that a document creating a *wakf* might contain provision also for the family of the settlor, the dedication to charitable uses being postponed, yet here there was not even an ultimate dedication of the property to charitable uses, but the object of the executant was evidently merely the maintenance of the family estates and of the dignity of the *riasat*.

Sheik Mahomed Ahsanulla Chowdhry v. *Amirchand Kundu* (1) followed. *Ranee Khujooroonissa* v *Mussamut Roushun Jehan* (2) *and Nizamuddin Gulam* v. *Abdul Gafur* (3) referred to.

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* First appeal No. 143 of 1888 from a decree of Babu Nilmadhab Rai, Subordinate Judge of Gorakhpur, dated the 29th June 1888.

(1) L. R., 17 I A., 28. (2) L. R., 3 I A., 291.
(3) I. L R., 13 Bom., 264.

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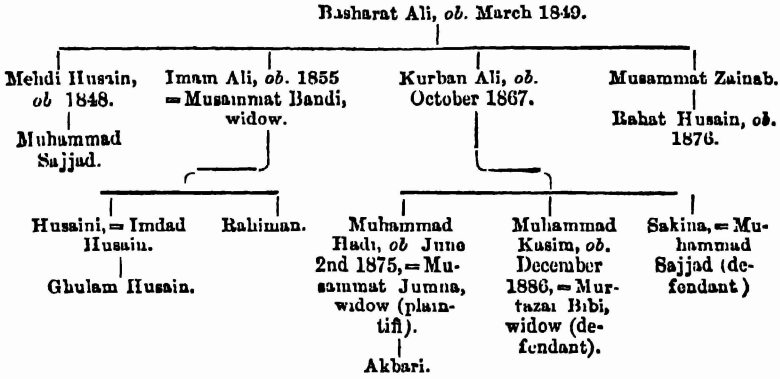
MURTAZAI BIBI v. JUMNA BIBI.

The parties to this appeal were Muhammadans of the Shia sect whose relationship to one another will be apparent from the accompanying genealogical tree :—



The plaintiff, Musammat Jumna, brought her suit in the Court of the Subordinate Judge of Gorakhpur for her share by inheritance of the property of her deceased husband, Muhammad Hadi, who died in 1875, alleging that she had on various pretexts been put off and kept out of her rights by her brother-in-law, Muhammad Kasim. The other two plaintiffs were pleaders to whom the principal plaintiff had sold a portion of her share of the property in suit to provide herself with funds for carrying on the litigation. The suit was resisted by the defendants, the widow and sister of Muhammad Kasim, mainly on the following grounds, *viz.*, that Musammat Jumna, the plaintiff, was not the widow of Muhammad Hadi, and that by reason of a deed executed by one Basharat Ali, the common ancestor of both the parties, in 1848, the plaintiff could have no claim to the inheritance so long as there were male descendantst of Basharat Ali living. The defendants also alleged that the plaintiff, Musammat Jumna, had acquiesced in the transfer of the property in suit to Muhammad Kasim on the death of Muhammad Hadi, that both Muhammad Hadi and Muhammad Kasim had dealt with the property as their own, and that Musammat Jumna had never lived in the house of Muhammad Hadi. The Subordinate Judge found on these pleadings that the plaintiff, Musammat Jumna, was

lawfully married to Muhammad Hadi, and that the document relied upon by the defendants was a will, under which, as the conditions of it had come to an end, nobody could take anything, and that therefore the position of Muhammad Hadi's heirs was exactly what it would have been according to Muhammadan law at the date of his decease in June 1875. The Subordinate Judge accordingly passed a decision in favour of the plaintiffs. The defendants then appealed to the High Court.

Mr. *D. Banerji*, Mr. *Abdul Majid* and Maulvi *Mehdi Hasan*, for the appellants.

Mr. *B. M. Colvin* and Mr. *C. H. Hill*, for the respondents.

STRAIGHT, J.—Then comes the third question, which is a question of law, and this entirely turns upon the construction to be given to the document of the 16th March 1848. As to the genuineness of this document no controversy is raised, and we must take it that it was executed by Basharat Ali, the ancestor of the parties. At the outset of this judgment I took occasion to advert to the statement of defence, and the case therein set up, and it is to be remarked in this connection that in that written statement this instrument of the 16th March 1848 is spoken of as a deed of settlement, and as such it was put forward and relied upon before the learned Subordinate Judge. In the 7th plea in both the memoranda of appeal it is said :—" Because the document of 16th March 1848, executed by Mr. Basharat Ali, is in the nature of a settlement, and *not a will*, and binding upon the parties. Moreover it had been carried out." Despite this having been the position taken up in the Court below, and in the plea in appeal, an entirely new ground was adopted before us, the contention being that this instrument constituted a *wakf* created by bequest. Mr. *Hill*, when this point was raised by Mr. *Banerji* for the appellants, not unnaturally urged that the whole position for the appellants had been changed and that the contention now put forward on their behalf was inconsistent and at variance with the position they had asserted below and in their memorandum of appeal. I am not at

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all sure that I should not be more strictly performing my duty if I were to limit the appellants to the contention upon which the trial before the First Court proceeded; but as I think under all the circumstances it might be inconvenient to adopt that course, I am prepared to decide the questions of law in the case not upon that narrow view, but in its broader aspect. Now what then is this instrument, of the 16th March 1848? By paragraph 1, the party executing it recites that, being "in the last stage of his life, and in old age, he executes this deed as a valid document as regards *heir and inheritance*." And he then goes on to set out his various properties, which he states to be of "his own obtaining or creation, and that he has the full power over them by way of gift or transfer either to his kindred or to a stranger." In paragraph II, he recites that his son, Mehdi Hasan, who was at that time alive, had acted in a way that he did not approve, and that he therefore, excludes him from inheritance. As regards his two remaining sons, Imam Ali and Kurban Ali, he goes on to say that Kurban Ali has made himself extremely useful in the management of his property, in looking after his affairs, and in protecting it from attacks and litigation; and he uses the following expression:—"There is no one among my heirs, excepting Kurban Ali, who has ability to protect the livelihood. All these rights, personal earnings, and the whole income, after deduction of expenses relating to door (*darwaza*), Court occasions, of ceremonies and *taziadari* in Muharram, &c., appertaining to me will also be in the power of Kurban Ali in a proper manner." Then, in the next paragraph, he proceeds to make division, and he says:—"Supposing that the whole of my *maásh* (livelihood) is Re. 1, out of it 4 annas for Kurban Ali as remuneration for the labour, management of the livelihood, and opposition of claimants and adversaries which appertain to him. The remainder is 12 annas, which has been equally allotted to Kurban Ali and Imam Ali, *i.e*, in equal shares of 6 annas each. But as regards *patta*, and *kabuliat* of tenants and lessees, purchase, sale, gift and *tamlik*, &c., *i.e.*, in the matters relating to the management and transfer, Imam Ali, illiterate, neither has, nor shall have, any power without the consent and advice of Kurban Ali. But sometimes, in

case of Kurban Ali being engaged in other work, Imam Ali also, with the consent and advice of Kurban Ali, shall have power in matters of demand, settlement on account, receipt and acquittance in respect of the revenue fixed." Then further a provision is made for Zainab Bibi; and then comes the concluding paragraph, which, it seems to me, it is necessary should be read at length:—

"Let it be known that this property, together with its income, has been assigned to my heirs, *for maintenance and for protection and perpetuation of riasat and not for any sort of transfer;* but the way for the management is that one person be the owner and manager of the whole and the rest be his dependents and sharers in the profits in cash to the extent of their fixed shares without division of any land, for by division *power will be diminished and the riasat will be reduced to small parts. Then there will be neither the perpetuation of riasat nor the perpetuation of honour, and then the distinction of my family will be lost.* Therefore the powers of management of villages and domestic affairs, payment of revenue, and defending the claim of adversaries to the *riasat*, &c., *i.e.*, of all matters in connection with the protection, authority, and proprietorship, have been conferred upon Kurban Ali just as I have. He shall not be interfered with therein by any one else. It is incumbent on him also that by honestly acknowledging and giving effect to this deed he should assign this *riasat* to one of his legitimate and rightful issue after his death, and he, the latter, should also do the same after his death, *i.e.*, should assign this *riasat* in regular succession, subject to these customs, so that, God willing, *this riasat may be preserved in my family generation after generation.* It should also be binding that so long as there may be any male issue of any sharer this right should never be conferred upon any daughter or the issue of a daughter. But it is allowed to fix something in cash for maintenance for life as I have done, in case of insufficient livelihood. The document, with all its conditions, should be in force after my death, both against my heirs and the property left by me, and everyone should consider it binding on him to carry it into effect. Until my death my power will remain as it is."

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Now it seems to me that no rational person reading that document through can come to any other conclusion than that the only object that the maker of it had in view, to use his own words, was "the perpetuation of the *riasat*, the perpetuation of honour and the distinction of his family, and that the *riasat* might be preserved generation after generation." The mere casual mention in the middle of the document of "expenses relating to door (*darwaza*) and of ceremonies and *taziadari* in Muharram," does not appear to me to alter the real, main and direct scope and object of the instrument, about the meaning and intent of which there seems to me no room for two opinions.

Such being the nature of the deed, Mr. *Banerji*, upon the strength of a passage appearing at page 203 of Mr. Amir Ali's Tagore Law Lectures, contended that it constituted a good *wakf* of the whole of the properties. I confess that I was a little startled at this argument, and the more I have thought of it since, the more difficult have I found it to see any force in it. In the case of *Ranee Khujooroonissa* v. *Mussamut Roushun Jehan*, (1) (a case which, by the way, may be looked at for other purposes, in connection with this appeal than those for which I am about to use it), there is the following passage in the judgment of their Lordships of the Privy Council:—"The policy of the Muhammadan law appears to be to prevent a testator interfering by will with the course of the devolution of property according to law among his heirs, although he may give a specified portion, as much as a third, to a stranger. But it also appears that a holder of property may, to a certain extent, defeat the policy of the law by giving in his lifetime the whole or any part of his property to one of his sons, provided he complies with certain forms. It is incumbent, however, upon those who seek to set up a proceeding of this sort, to shew very clearly that the forms of the Muhammadan law, whereby its policy is defeated, have been complied with." This lays down a golden rule, which has ever since been followed in dealing with such documents in cases among Muhammadans.

(1) L. R., 3 I. A., 291.

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The passage in Mr. Amir Ali's book that was the foundation of Mr. *Banerji's* argument is this :—"Kazi Khan, following Imam Ibn-ul Fazl, states that *wakf* is of three kinds in relation to the state in which it is made—

(1) When it is made in health;

(2) When it is made in illness;

(3) When its operation is made dependent upon death.

"Change of possession and appropriation is necessary in the first, but *not* in the third, for that is testamentary in its nature; but the second is like the first, though it takes effect with reference to the third of the estate of the *wakif* like a gift made in death illness.

"It has been already stated that a *wakf* is irrevocable, but a *wakf* made by a person to take effect after his death, or what is called a *wakf* by way of *wasiat* (*wakf-bil-wasiat*) is revocable at any time before his death."

If this case involved the bare question as to whether a *wakf* could be constituted by bequest, and if I were unable to dispose of this appeal without determining that point, I should have thought it right to obtain the assent of my brother Tyrrell to the disposal of this appeal standing over till the decision of the Full Bench in a case which has been referred by my brothers Mahmood and Young had been given; but it seems to me that Mr. *Banerji's* concession in answer to a question I put to him, has relieved me of any difficulty, and that we may dispose of this appeal upon the assumption that a "*wakf*" by bequest may be created. While Mr. *Banerji's* contention upon the passage is that a *wakf* may be constituted by bequest, he was constrained to admit, that, even if so made, it must be accompanied by all the incidents of *wakf*; and that, except in so far as immediate change of possession is concerned, a *wakf* created by bequest, and a *wakf* created by a deed to take immediate effect in the lifetime of the *wakif*, stand upon the same footing. If this were not so, it is easy to see that any Muhammadan might defeat the ordinary rules of his law of inheritance and his heirs by disposing of his property by a *wakf*. No question arises here as to this

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document having been executed by Basharat Ali in death sickness, or that it was to have effect at once; indeed, it is perfectly plain he contemplated that things should continue unchanged in his lifetime. In my opinion, the Muhammadan law, whether it be Shia or Sunni law, and I have had no authority shown me to the contrary, requires that to constitute a valid *wakf* it must be for purposes that cannot fail, and it must have some pious and charitable object. If no such incident as the latter were required, then every Muhammadan intending to make a will as to his whole property would do so by constituting a *wakf* by bequest. In passing I may remark that in former litigation in regard to this very document, it was treated as a will, by the representative of Kurban Ali, and it was upon that contention that they succeeded in those proceedings.

Now it is not denied, as I have before remarked, that for the purpose of constituting a *wakf* there must be certain specific conditions. I am willing to concede also that an endowment in the nature of a *wakf* would not be bad, because out of the property endowed, provision was made for the settlor's family. But, even if it be conceded that, whilst *inter vivos*, change of the character of his possession is necessary where the settlor creates himself the *mutwalli*, or where he creates somebody else the *mutwalli* by direct *seisin* of possession, no change of possession is necessary where the endowment is created by bequest; yet there must be the other essential incident of *wakf*, *i.e.*, a substantial dedication of property to charitable uses, to come into effect some time or another. I am not prepared to hold, as at present advised, that a man's gift to his male heirs in succession by ownership is a charitable gift in any such sense, and, until I am corrected by higher authority, I must decline to do so. What by this document of the 16th March 1848, Basharat Ali did was that for the maintenance of the integrity of his *riasat* and the glorification of his family he tied up his property, directed and limited its devolution, and prohibited all transfers of it. It seems to me that I have direct countenance for the view I have expressed in the judgment of their Lordships of the Privy Council

in the case of *Sheik Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (1), where the whole question was very fully discussed. At page 36, appear the following passages, which I think may be conveniently referred to by me :—

"Their Lordships do not attempt in this case to lay down any precise definition of what will constitute a valid *wakf*, or to determine how far provisions for the grantor's family may be engrafted on such a settlement without destroying its character as a charitable gift. They are not called upon by the facts of this case to decide whether a gift of property to charitable uses which is only to take effect after the failure of all the grantor's descendants is an illusory gift, a point on which there have been conflicting decisions in India.

"On the one hand their Lordships think there is good ground for holding that provisions for the family out of the grantor's property may be consistent with the gift of it as *wakf*. On this point they agree with and adopt the views of the Calcutta High Court, stated by Mr. Justice Kemp in one of the cited cases. After stating the conclusion of the Court that the primary objects for which the lands were endowed were to support a mosque and to defray the expenses of worship and charities connected therewith, and that the benefits given to the grantor's family came after those primary objects, that learned Judge says :—'We are of opinion that the mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease, being confined to one family, and which after they lapse will leave the whole property intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Muhammadan law.'

"On the other hand, they have not been referred to, nor can they find, any authority shewing that, according to Muhammadan law, a gift is good as a *wakf* unless there is a substantial dedication of the property to charitable uses at some period of time or other. Mr. Arathoon indeed contended that a family settlement of itself imports an ultimate gift to the poor, founding himself on a passage in the

(1) L. R., 17 I. A., 28.

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Tagore Lectures delivered in 1885, by a learned Muhammadan lawyer. But no authority has been adduced for that proposition. The observations of Mr. Justice West, which are relied on by the learned lecturer, do not go that length, and they are themselves of an extra-judicial character, as the case in which they were uttered did not raise the question. Their Lordships therefore look to see whether the property in question is in substance given to charitable uses."

In the concluding part of the judgment their Lordships point out that the document in question appeared in the main to contemplate aggrandisement of the family, and not charity, and they say, "the gift in question is not a *bonâ fide* dedication of the property, and the use of the expressions, "*fisabilillah wakf*" and similar terms in the outset of the deed, is only a veil to cover arrangements for the aggrandisement of the family and to make their property inalienable."

It seems to me that that case is directly in harmony with the present, the only distinction being that that was an endowment *inter vivos*, while this purports to be a "*wakf*" under a document to come into effect after death. I therefore hold that no *wakf* was legally constituted, and in further support of this view I may refer to a judgment of the Bombay High Court which is to be found in the case of *Nizamuddin Gulam* v. *Abdul Gafur*, (1) which goes fully into the question as to whether a *wakf* can be created without some express provision being made for the ultimate devolution of the property in respect of which *wakf* is made, for some charitable and religious object. It has been asserted that because Imam Ali did not in his lifetime assail the document of the 16th March 1848, he must be taken to have accepted and acquiesced in it. This contention was not raised in the Court below, nor am I prepared to accept it; indeed the evidence on the contrary shows that, so far as his widow and heirs were concerned, they, immediately after his death, came into Court with a suit against Kurban Ali asserting their

(1) I. L. R., 13 Bom., 264.

rights by inheritance under the Muhammadan law, and disputing the proposition that they were bound by the terms of the document of 1848.

I am therefore of opinion that this document of the 16th March 1848 was not a *wakf* by bequest, and that the plaintiffs are entitled to take their shares as if it never existed as the widow and daughter of Muhammad Hadi.

There only remains the question raised by the cross-objections filed on behalf of the respondents, as regards the learned Subordinate Judge's order as to costs. He says in his judgment :—" In determining the costs of this case, I cannot help remarking that the present suit savours of champerty. In this case two Mukhtars, who, as legal practitioners, ought to have known better, are co-plaintiffs with Jumna. The greater portion of the property goes to them. Perhaps the suit would have been amicably settled had these men kept aloof from the family dispute. Although the law of champerty does not apply in the mufassil, yet a Court of equity ought to look with great disfavour upon contracts of this nature. Pleaders and Mukhtars specially ought not to take up civil cases as a matter of commercial speculation, and thereby promote unnecessary and vexatious litigation. Having regard to these facts, and taking into consideration all the circumstances of the case, I think it is fair and equitable that parties should pay their own costs."

I really fail to understand why the learned Subordinate Judge uses the expression 'promoting unnecessary and vexatious litigation.' Muhammad Hadi died on the 2nd June 1875; this suit would have been barred by limitation upon the 2nd June 1887; and the plaintiffs were only placed in a position to institute it by their co-plaintiffs, upon the 14th May 1887. The Subordinate Judge's own findings satisfactorily established that the suit was not unnecessary and that the litigation was not vexatious. On the contrary the female plaintiffs are fully entitled to the shares by inheritance which they claim; and I do not see why they and those who have assisted them should not have their costs. I dismiss the appeals in both cases, with costs, and allow the objections of the plaintiffs with costs.

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TYRRELL, J.—I agree with all that has fallen from my brother Straight, and with the decree passed by him.

Appeals dismissed.

[NOTE.—This case is connected with F. A. No. 142 of 1888 in which also similar questions were in issue and the same judgment was delivered in both cases. Of this judgment only so much had been reported as relates to the point of law decided thereby, the former portion of the judgment dealing exclusively with the facts of the case.—W.K.P.]

FULL BENCH.

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December 20.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

JANG BAHADUR SINGH AND ANOTHER (PETITIONERS) *v.* SHANKAR RAI AND ANOTHER (OBJECTORS)

Counsel and client—Authority of counsel to compromise a case on behalf of his client—Nature of power conferred by counsel's retainer.

A counsel, unless his authority to act for his client is revoked and such revocation is notified to the opposite side, has, by virtue of his retainer and without need of further authority, full power to compromise a case on behalf of his client; and the Court will not disturb a compromise so entered into, unless it appears that it was entered into under a mistake and that some palpable injustice has been thereby caused to the client. *Strauss* v. *Francis* (1), *Matthews* v. *Munster* (2) and *In re West Devon Great Consols Mine* (3) referred to.

THIS was a reference to the Full Bench by Mahmood, J. The circumstances under which the reference was made, as also the facts of the case, are sufficiently stated in the judgment of Edge, C. J.

EDGE, C. J.—This was a reference by my brother Mahmood to the Full Bench for expression of its opinion on a question raised as to the authority of advocates by an application for review of a decree passed by my brother Mahmood. The applicant on the hearing of the appeal in this Court was represented by Mr. *Spankie*, one of the advocates of this Court. His opponents were repre-

(1) L. R., 1 Q. B., 379. (2) L. R. 20 Q. B. D., 141.
(3) L. R., 38 Ch. D., 51.

sented by Mr. *Conlan*, another advocate of this Court. Those gentlemen are also members of the English Bar. In the interest of their respective clients they agreed as to the form of the decree which should be passed by my brother Mahmood in the appeal. My brother Mahmood made a decree according to the terms agreed upon by those two advocates. My brother Mahmood acted under s. 577 of the Code of Civil Procedure. This applicant for review says, what we assume to be a fact, that he never agreed to those terms. He also says that he had not authorized his advocates to agree to any such terms. The question is, could my brother Mahmood interfere under the circumstances, review his judgment and alter his decree, dated the 23rd April 1890? It is not shown by the applicant that any unjust advantage was obtained by his adversary, or that Mr. *Spankie* acted under any mistake in such a way as to produce any injustice, nor is there any affidavit before us suggesting anything of the kind. From what I know of Mr. *Spankie* is it not at all likely that he lost sight of the interest of his client. I have no doubt that if we were satisfied that any unjust advantage had been obtained by the other side, or that Mr. *Spankie* had acted under a mistake in such a way as to produce injustice to this applicant, we could interfere. In order that I may not be misunderstood I had better say that what I understand as unjust advantage is not the consenting to terms which the client may object to, and which he may consider unjust; but some substantial injustice which should induce us to act. In most cases of compromise points have to be given up and concessions have to be made on each side. I may say, after many years' experience at the bar, that I think a respectable and responsible advocate of experience is a much better Judge of what course he should take for the best interest of his client than the client ever is. As an illustration as to the length to which the Courts in England have gone in upholding the acts of an advocate I may refer to the case of *Strauss* v. *Francis* (1) which decided that:—"It is within the general authority of counsel retained to conduct a cause to consent to the withdrawal of a juror, and the compromise being within the

(1) L. R., 1 Q. B., 379.

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counsel's apparent authority is binding on the client, notwithstanding he may have dissented, unless this dissent was brought to the knowledge of the opposite party at the time." I may refer also to the following passage in the judgment of Mr. Justice Blackburn in that case (at page 381):—" Mr. *Kinealy* has ventured to suggest that the retainer of counsel in a cause simply implies the exercise of his power of argument and eloquence. But counsel have far higher attributes, namely, the exercise of judgment and discretion on emergencies arising in the conduct of a cause, and a client is guided in his selection of counsel by his reputation for honour, skill and discretion. Few counsels, I hope would accept a brief on the unworthy terms that he is simply to be the mouthpiece of his client. Counsel therefore being ordinarily retained to conduct a cause without any limitation, the apparent authority with which he is clothed when he appears to conduct the cause is to do every thing which in the exercise of his discretion he may think best for the interest of his client in the conduct of the cause; and if, within the limits of this apparent authority, he enters into an agreement with the opposite counsel as to the cause, on every principle this agreement should be held binding." I do not think, I could express my views on a matter of this kind more fully or clearly than by adopting the judgment of Lord Esher in the case of *Matthews* v. *Munster* (1) which I think correctly lays down what the authority of the counsel is. I may quote the following passage from that judgment; the judgments of Lords Justices Bowen and Fry are equally instructive:—" This state of things raises the question of the relationship between counsel and his client, which is sometimes expressed as if it were that of agent and principal. For myself I do not adopt and never have adopted that phraseology, which seems to me to be misleading. No counsel can be advocate for any person against the will of such person, and, as he cannot put himself in that position, so he cannot continue in it after his authority is withdrawn. But when the client has requested counsel to act as his advocate he has done something more, for he thereby represents to the other side that counsel is to act for him in the usual course, and he must be bound

(1) L. R., 20 Q. B. D., 141.

by that representation so long as it continues, so that a secret withdrawal of authority unknown to the other side would not affect the apparent authority of counsel. The request does not mean that counsel is to act in any other character than that of advocate, or to do any other act than such as an advocate usually does. The duty of counsel is to advise his client out of Court and to act for him in Court, and, until his authority is withdrawn, he has, with regard to all matters that properly relate to the conduct of the case, unlimited power to do that which is best for his client." Now the meaning of this passage is this that a client employing an advocate cannot restrict the powers of that advocate to bind him in the suit unless he gives notice to his opponent that he has withdrawn or limited the authority of the advocate to act for him. Then again :—" I have said that the relation of an advocate to his client can be put an end to it at any moment, but that the withdrawing of the authority must be made known to the other side, and this shows that the client cannot give directions to his counsel to limit his authority over the conduct of the cause, and oblige him to carry them out ; all he can do is to withdraw his authority altogether, and in such a way that it may be known he has done so." In the case of *In re West Devon Great Consols Mine* (1) in which the counsel had agreed not to appeal on terms, and his clients questioned his right to bind them, Lords Justices Cotton, Lindley and Bowen held that the clients were bound by the acts of their counsel. At page 54 of the report, Cotton, L. J. is reported to have said :— " The questions were raised in argument whether an undertaking not to appeal could be given at all by counsel without express authority, and if it could, whether it could be given after a decision on the merits. Now every compromise involves an undertaking not to appeal, it therefore cannot be beyond the authority of counsel to undertake that his client shall not appeal. As to the other point the counsel in fact says :—' The Judge has given a decision adverse to my client, and in consideration of his receiving his costs I undertake that he shall not appeal against it.' That is a compromise. The undertaking therefore is *primâ facie* binding." There are other cases

(1) L. R , 38 Ch. D., 51.

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also which show how careful the Courts are not to interfere with compromises or settlements effected by counsel on behalf of clients in suits. The case of *Prem Sookh* v. *Pirthee Ram* (1) that of *Hakeemoonnissa* v. *Buldeo* (2), and the case of *Sirdar Begum* v. *Izzutoolnissa* (3) are cases which relate to the authority of vakils and do not affect the case before us. When the authority of vakils to bind their clients is called in question that authority must depend entirely on the terms of the particular vakalatnáma. For my part I should read a vakalatnáma widely and liberally, unless it appears that the client intended to limit the authority of his vakil. In my opinion my brother Mahmood should reject this application for review.

STRAIGHT, J.—I am entirely of the same view, and approve of the learned Chief Justice's answer to this reference, namely, that the compromise on which my brother Mahmood made his decree was binding on both parties to the appeal.

TYRRELL, J.—I concur in the view of the learned Chief Justice, and in the answer given to the reference.

MAHMOOD, J.—I also concur in the answer of the learned Chief Justice, and my brother Straight.

KNOX, J.—I concur.

The application for review was disposed of on the same day in accordance with the views expressed by the Full Bench by the following order :—

MAHMOOD, J.—This is an application under s. 626 of the Code of Civil Procedure by an applicant for review of judgment. It was referred to the Full Bench by me, and the answer which has been given by the Full Bench renders it necessary for me to deal with it under s. 627 of the Code of Civil Procedure, and the rule No. 6 of the rules of the Court. In view of the answer given by the Full Bench I reject this application. No order as to costs is necessary, as no notice has gone to the opposite party.

Application rejected.

(1) N.-W. P. H. C. Rep., 1867, p. 222. (2) N.-W. P. H. C. Rep., 1868, p. 309.
(3) N.-W. P. H. C. Rep., 1870, p. 149.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

1890 *December* 20

MUHAMMAD BAKAR (DEFENDANT) *v.* BAHAL SINGH (PLAINTIFF.)

Act IX of 1887 (*Provincial Small Cause Courts' Act*) *s.* 25—*Small Cause Court —Revision—Circumstances under which the High Court will exercise its revisional powers under s.* 25 *of Act IX of* 1887.

Section 25 of the Provincial Small Cause Courts' Act (Act IX of 1887) was not intended to give in effect a right of appeal in all Small Cause Court cases, either on law or fact. The revisional powers given by that section are only exercisable where it appears that some substantial injustice to a party to the litigation has directly resulted from a material misapplication or misapprehension of law, or from a material error in procedure. *Muhammad Nizam-ud-din Khan* v. *Hira Lal* (1) and *Masum Ali* v. *Mohsin Ali* (2) approved.

THE facts of this case were as follows :—

The plaintiff sued in the Small Cause Court at Saháranpur for the sum of Rs. 300 on a promissory note and a sale-deed executed in favor of the plaintiff on behalf of Muhammad Hashim, the creditor, on account of the promissory note. The defendant pleaded (1) that the instrument sued on was not a promissory note, but an agreement, hence no cause of action had accrued to the plaintiff, (2) that no notice as provided by s. 13 of Act IV of 1883 had been issued to him, and (3) that the plaintiff could not derive any benefit contrary to the terms of the instrument and that the plaintiff's claim against the defendant's person was improper. The Court framed issues in accordance with these pleadings and decided all of them in favour of the plaintiff; giving the plaintiff a decree for the sum claimed with costs. The defendant then applied to the High Court for revision on the following grounds :—(1) because the learned Judge was wrong in holding that the condition about the time of payment was void under s. 29 of Act IX of 1872, (2) because the document sued upon was insufficiently stamped and was therefore inadmissible in evidence, and (3) because the suit was premature. The application came on for hearing before Straight, J., who referred it to a Division Bench. It then came

(1) Weekly Notes, 1890, p. 121. (2) Weekly Notes, 1890, p. 201.

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before Edge, C.J., and Brodhurst, J., who ordered that it should be laid before the Full Bench.

Maulvi *Ghulam Mujtaba*, for the applicant.

Pandit *Sundar Lal*, for the opposite party.

EDGE, C.J., STRAIGHT, TYRRELL, MAHMOOD and KNOX, JJ.—We are of opinion that the powers conferred by s. 25 of Act IX of 1887 are purely discretionary. We agree with the opinion of Mahmood, J., *in re Muhammad Nizam-ud-din Khan* v. *Hira Lal* (1) and *Masum Ali* v. *Masum Ali* (2) that it was not intended by that section to give in effect a right of appeal in all Small Cause Court cases, either on law or fact. We think we should not interfere under s. 25 of the Act unless it clearly appeared to us that some substantial injustice to a party to the litigation had directly resulted from a material misapplication or misapprehension of law or material error in procedure in the Court of Small Causes and that this is not such a case. The application is dismissed with costs.

Application dismissed.

1890
December 22.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

OUDH BEHARI LAL (JUDGMENT-DEBTOR) *v.* NAGESHAR LAL (DECREE-HOLDER,)

Execution of decree—Application for order absolute for sale—Mortgage—Act IV of 1882 (Transfer of Property Act) ss. 88 and 89.

The holder of a decree under s 88 of the Transfer of Property Act (IV of 1882) applied for execution to the Court charged with execution of the decree,

Held that this was a good application under s. 89 of the Act, and that it was not necessary that such application should be made to the Court which had passed the decree. An application for an order absolute for sale under s. 89 of the Transfer of Property Act (IV of 1882) is a proceeding in execution and subject to the rules of procedure governing such matters.

THIS was a second appeal in execution proceedings. The respondent was the holder of a decree for enforcement of a hypothecatory lien dated the 31st January 1885. The terms of the decree were as follows:—"It is ordered and decreed that a decree be passed against the absent defendant and against the property hypothecated,

(1) Weekly Notes, 1890, p. 121. (2) Weekly Notes, 1890, p. 201.

for the amount claimed with costs and a future interest, by the enforcement of the hypothecation of the property mortgaged, and that the property mortgaged can be sold after six months." The decree-holder applied on more than one occasion and the judgment-debtor obtained postponements on various pleas. Ultimately, however, on the decree-holder making an application for execution, the judgment-debtor objected that execution could not be granted, the decree not being framed in accordance with the provisions of s. 88 of the Transfer of Property Act (IV of 1882). This objection was disallowed by the Subordinate Judge on the 25th November 1889. The judgment-debtor then appealed to the District Judge who upheld the Subordinate Judge's order, holding that the decree was practically in conformity with the provisions of s. 88 of the Transfer of Property Act, that the application before him was to all intents and purposes an application under s. 89 of the same Act, to have the order for sale made absolute and the property sold, and that since proceedings under s. 89 were proceedings in execution it was not necessary for the decree-holder to make two applications, one to have the order for sale made absolute and another to sell the property. The judgment-debtor then appealed to the High Court. The appeal came before Mahmood, J., who ordered it to be laid before a Bench of two Judges with the suggestion that the question involved was one which, with a view to uniformity of practice in the Court, it might be advisable to refer to the Full Bench. The case was accordingly under the order of the Chief Justice of the 7th November 1890 laid before the Full Bench.

Babu *Durga Charan Banerji*, for the appellant.

Mr. *T. Conlan* and Munshi *Ram Prasad*, for the respondent.

STRAIGHT, J.—The point raised by this reference, which has been made to the Full Bench by the learned Chief Justice at the instance of my brother Mahmood, arises as to the construction to be placed upon s. 89 of the Transfer of Property Act. The appeal before my brother Mahmood was an execution appeal from an order of the District Judge of Gorakhpur, dated the 10th January 1890, by which he held that the decree before him, execution of which had

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been sought in the first Court, was a decree which practically complied with the requirements of s. 88 of the Transfer of Property Act, and that the application of the 23rd August 1888, for the execution of that decree was an application within the meaning of s. 89 of the Transfer of Property Act. That application was in the following terms :—"In my former application of the 6th July 1886, for sale of property, which was transferred to the Collector, the judgment-debtor applied for time and made an agreement to the effect that at the end of October 1887 he would pay, and he made an application for extension of time in Court and my application was dismissed. He has not paid, and therefore this application is made, and it is prayed that the property be attached and sold."

It has been contended this is not an application within the meaning of s. 89 of the Transfer of Property Act, for an order absolute for sale, and Mr. *Durga Charan*, who appears in support of the judgment-debtor, objector, appellant in the appeal, argues that that application is one which should be made to the Court which passed the decree as the Court which passed the decree, and it is not an application in execution. In other words, Mr. *Durga Charan* contends that before sale can be ordered, the Court which passed the original decree for sale, must make that decree absolute.

I am of opinion that an application for an order absolute for sale under s. 89 of the Transfer of Property Act is a proceeding in execution, and subject to the rules of procedure governing such matters.

In reference to the analogous s. 87 of the same Act, a like view was expressed by my brother Mahmood and myself in the case of *Kedar Nath* v. *Lalji Sahai* (1), with regard to orders absolute for foreclosure, and I see no grounds for doubting the propriety of that decision. Where a decree has been passed under ss. 86, 87, 88, 89 or 92 directing payment into Court by a specified date of a sum of money and, in the event of its not being paid, declaring that foreclosure or sale shall follow, or a right to redeem shall be barred, it would, in my opinion, be a misnomer, if payment is made, to des-

(1) I L. R., 12 All., 61.

cribe such payment as other than one made in execution of decree. On the other hand, it appears equally clear to me that if such payment is not made, the consequences which follow are also matters concerned with the execution of the decree, flowing as a matter of course out of the decree itself, *viz.*, to give it effect against the judgment-debtor for having failed to satisfy the conditions of the decree. If decrees are properly prepared under ss. 86, 88 and 92, they should fully set out all these conditions and declare the consequences that will follow if they are or are not fulfilled.

Such being the view I take of this matter, the decision of the learned Judge below was a right decision and this appeal must be and it is dismissed with costs.

EDGE, C.J.—I concur.

TYRRELL, J.—I entirely concur.

MAHMOOD, J.—I also agree in my brother Straight's judgment, and also in everything that he has said, but I am anxious to say, as one of the Judges who referred this case to the Full Bench, and with reference to my order of reference of the 1st August 1890, that there are three rulings of this Court, to be considered, and one ruling of the Calcutta Court. Dealing first with the printed case of *Ram Lal* v. *Narain*, (1) to which reference is made in my order of reference, I cannot help feeling that the judgment delivered by my brother Straight to-day conflicts with that decision, and since his judgment in this case has the concurrence of the whole Court, I hold that the earlier decision cannot be any longer treated as authority upon this point. The next is an unreported case which also is before me, *viz.*, *Babu Dina Prasad Singh* v. *Shah Sifat Alam* (F. A. No. 16 of 1889) which was disposed of by the learned Chief Justice on the 2nd July 1889. That judgment also was cited, and I must express the opinion that the view expressed by my brother Straight to-day renders that judgment also unauthoritative for any further discussion of the same question in this Court. The third case is that of *Musammat Parbati* v. *Behari Raj* (S. A. No. 512 of 1890) on the execution side, which was disposed

(1) I. L. R., 12 All, 539.

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of by the judgment of the learned Chief Justice and our late colleague Mr. Justice Young dated the 8th May 1890, and that judgment is confirmed by what my brother Straight has said. Then comes the fourth case, namely, the case in which the Calcutta Court in the case of *Poresh Nath Mojumdar* v. *Ramjodu Mojumdar* (1) decided the same point, and it was cited by Mr. *Durga Charan* as an authority in his favour.

There is much in that judgment which undoubtedly supports the argument which Mr. *Durga Charan* addressed to us. But it is unnecessary, after the expression of opinion which has been given to the view of this Bench by my brother Straight, that I should say anything more than this that I am not prepared to accept that or all that was said in that case either as to the theory of the *decrees nisi* in such cases or as to the decrees absolute or their effect upon the procedure of the Court, which is governed by the Civil Procedure Code. I therefore give my full concurrence to all that has fallen from my brother Straight.

KNOX, J.—I concur with what has been said by the learned Chief Justice and my brother Straight.

Appeal dismissed

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December 22.

Before Sir John Edge, Kt., Chief Justice, Mr Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr Justice Knox.

AMME RAHAM AND OTHERS (PLAINTIFFS) *v* ZIA AHMAD AND OTHERS (DEFENDANTS).

Act XV of 1877 (*Limitation Act*) *sch. ii, No* 127—*Limitation—Suit by Muhammadans for possession by right of inheritance of shares in the property of their deceased ancestor.*

The words "joint family property" in No. 127 of sch ii of the Limitation Act (XV of 1877) mean "the property of a joint family."

Hence the period of limitation prescribed by No 127 of sch. ii of the Limitation Act will not apply to a case in which members of a Muhammadan family are suing for possession by right of inheritance of shares in immovable property alleged to have been that of the deceased common ancestor of themselves and some of the defendants, and of which they allege they had been dispossessed by the defendants.

Bavasha v. *Manumeha* (2) dissented from.

(1) I. L. R., 16 Calc., 246. (2) I L R, 14 Bom, 70.

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THE plaintiffs in this case were two daughters and a granddaughter of one Karamat Husain who died in February 1862, possessed, as the plaintiffs alleged, of a certain village granted to him in recognition of his services during the mutiny. They alleged that on the 20th June 1880, Nihal Ahmad, the son of Karamat Husain (brother and uncle of the plaintiffs) sold the said village and the vendees in their turn transferred it to others; that they came to know of this on the death of Nihal Ahmad in 1884, and demanded possession of their shares from the assignees. This being refused, they sued the assignees together with certain other members of the family of Karamat Husain for recovery of possession of what they alleged to be their shares in the property together with *mesne* profits. The suit was resisted amongst other grounds on the ground that it was barred by limitation. The Court of first instance dismissed the suit. The plaintiffs then appealed to the High Court and the appeal came before Mahmood and Young, JJ. who, on the question of limitation being again raised, referred the case, by their order of the 2nd July 1890, to the Full Bench for determination of the question whether or not the terms of No. 127, sch. ii of the Limitation Act were applicable to the case.

Mr. *Amiruddin* and Mr. *Abdul Majid*, for the appellants.

Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the respondents.

EDGE, C. J.—The only question which we need decide here is whether art. 127 of the second schedule of the Indian Limitation Act applies. This admittedly is not a family that could strictly or commonly be called joint. It is a Muhammadan family of these Provinces. The difficulty has arisen from the words "joint family property" in art. 127. Now those words may possibly be construed in two different ways. They might be construed as "the joint property of the family" or as "the property of the joint family." I think in this country we would be misconstruing those words "joint family property" to hold that they apply to a case where property was joint but the family was not. Many persons besides a family may have vested in them joint property. A, B and C, in no way related, may have vested in them joint property. If we were to read

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this article as meaning "the joint property of the family," the difficulty in my mind would arise as to what could be the reason why the Legislature intended that art. 127 should apply to a family that was not joint and made no similar provision in respect of the joint property of persons who not were members of the family. In my humble judgment "joint family property," means in art. 127 the property of a joint family and that would be strictly speaking "joint family property." The reason why the word "Hindu" which occurred in art. 127 of Act IX of 1871 was omitted from art. 127 of the present Code may be, that there are, as I believe, in some districts of India Muhammadan families which might be described as joint. The case is to go to the Bench of two Judges with this expression of opinion.

STRAIGHT, J.—By the plaint in this suit, the plaintiffs-appellants, after asserting that they had been in enjoyment of certain property, alleged that some of the defendants had dispossessed them from such enjoyment and they prayed for recovery of absolute possession of their shares according to the Muhammadan law of inheritance, in respect of the estate of a certain deceased person. They nowhere in their plaint alleged that the property is the joint property of a joint family, that they had been excluded from the joint enjoyment and prayed that their right to share in such joint enjoyment should be enforced. It seems, therefore, to me, that the article of the Limitation law naturally and properly applicable to their suit, was the provision to be found in art. 142 of the second schedule of the Limitation Act. As I understand, the rule of interpretation to be applied to the Limitation law is that if a form of suit naturally falls within the four corners of a particular article, we are not to strain construction for the purpose of throwing it into a category of suits to which a more favourable period of limitation is given by some other article of that law. Moreover the Legislature is to be presumed not to have made two limitation articles applicable to the same conditions of facts and identical suits.

Now I take it that art. 127 contemplates, first, a joint family in the accepted and well understood meaning of the term; next, it con-

templates joint family property; next, it contemplates joint enjoyment; and lastly, it contemplates exclusion from such joint enjoyment, which is the motive cause for the institution of the suit. With great respect to the learned Judge who decided it seems to me that the Bombay case of *Bavasha* v. *Masumsha* (1) overlooks the precise wording of this article. What the plaintiff in the suit to which that article applies must pray is to enforce his right to share in, not to a share of the joint family property; that is to say, it is a suit to restore the *status quo ante* of enjoyment that by his exclusion he has been deprived of. This is the particular form of suit to which that article is, in my opinion, limited, and it does not apply to such a condition of facts as are disclosed in the present case. I entirely concur with the learned Chief Justice in the answer proposed.

TYRRELL, J.—I agree.

MAHMOOD, J.—In order to render my judgment short, I wish to refer to the order of reference passed by me in this cause on the 2nd July 1890, in which Mr. Justice Young concurred and which necessitated its coming on for hearing, under the sanction of the learned Chief Justice, before this Bench of five Judges.

To what has fallen from his Lordship the learned Chief Justice and also from my brother Straight as to the exact meaning of art. 127 of the present Limitation Act (XV of 1877), I have nothing to add, beyond wishing to explain that when this case was argued in the Division Bench, much difficulty and doubt arose over some of the cases which are mentioned in my referring order.

I do not wish to deal with those cases in detail. It is enough for me to say that I will consider this point, now that it is before a Full Bench, wholly in reference to the observations which were made on behalf of the plaintiffs-appellants in connection with the alteration of the statutory words of art. 127 in the old Limitation Act (IX of 1871) as that alteration appears by a comparison with the corresponding clause of the present Limitation Act (XV of 1877). That alteration is represented not by the presence of anything, but by the absence of a word, *viz.*, the word "*Hindu*" and

(1) I. L. R., 14 Bom., 70.

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in lieu, thereof, "*Person*" is introduced. When the case was argued on behalf of the appellants I must confess that I felt, especially in view of the sudden change, (which certainly has to be considered seriously in statutory language) that this art. 127 was intended to be applied to Muhammadans also. The change at least sounded as an amendment of a great verbal sound, but that sound was nothing other than *vox et præterea nihil* so far as the exigencies of this case are concerned, because upon full consideration of this matter it seems to me that the Legislature never intended to apply to Muhammadans in the Provinces within the jurisdiction of this Court, a rule unknown to the land, unknown to the Muhammadan law, unknown to the people, by saying that upon the death of an ancestor or *propositus* his property does not descend to the heirs in definite separate shares, but acquires the nature of the joint properly of the Hindu jurisprudence. On the contrary, the Muhammadan law presumes that each share is separate and that each sharer is the separate owner of his separate share, and if such sharers wish to live together they may do so, but their separate ownership and relations are not changed.

Enough has been said by the learned Chief Justice and my brother Straight to show that for purposes of employing art. 127 of Act XV of 1877, certain things are necessary, that at least there must be a *joint family*, and I will not go further than that because my brother Straight has already represented what, the other three conditions are. Now in this part of the country the joint family systen as understood by Hindus does not exist among Muhammadans in the sense in which the law has employed it. Even if it did exist, I think I must say that the learned pleader Pandit *Ajudhia Nath's* argument before me when I made the referring order, was prefectly sound, that the law in these provinces will not allow the recognition of any such family *status* because of s. 27 of Act XII of 1887. I must also say what I felt when the learned Pandit then argued, and what I still feel, that the Bombay cases which on that occasion the learned counsel for the appellants referred to and insisted upon, have no application to this case, because it is governed

by a totally different statute as to the application of the Muhammadan law. I also agree with the argument of the learned Pandit, which the learned Pandit then addressed, that Regulation IV of 1872, of the Bombay Code, must not be lost sight of in determining the importance to be attached to the rulings on this point cited from that Presidency.

I wish to say, with reference to some observations which were made in the course of the argument when the case was heard in the Division Bench, (to the effect that it would be depriving the Muhammadans of this part of the country of a great right if the article in question were not applicable to suits such as this), that I have long held the opinion that the statutes of limitation are statutes of repose, and that, far from being construed in the sense of the strict construction of penal statutes against their application, they should be strictly enforced for security of titles. This I have said in more than one case to be found in the reports. I wish to add that whatever difficulty may arise over the interpretation of art. 127, of the present Limitation Act (XV of 1877), that difficulty need not be enhanced in a case in which Muhammadan ladies, even when they are *parda-nahsin*, sue after the lapse of time. For this view I wish to refer to cases where I have before now pointed out the cogency of the doctrine *vigilantibus non dormientibus jura subveniunt*.

One thing more. In the case of *Bavasha* v. *Masumsha* (1) upon which Mr. *Abdul Majid* has again relied to-day, the learned Judge in reading, or rather reproducing, the art. 127 of the Limitation Act (XV of 1877) seems apparently, so far as the report goes, to have understood the phrase "*to share therein*" as if the word "*share*" was a noun and not a verb. I do not understand it in that sense. I understand it to mean exactly what my brother Straight has described, *viz.*, that it is a verb and means "*to have restoration to joint enjoyment.*"

The other cases which have been referred to by me in the referring order must be taken subject to what in this case the learned Chief Justice and my brother Straight have said and which has the

(1) I. L. R., 14 Bom., 70.

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concurrence of my brother Tyrrell. The answer to this reference is that art. 127 of the present Limitation Act, XV of 1877, does not govern such actions as the one represented by the plaint in this case. I therefore agree in the order made.

KNOX, J.—I agree in the answers proposed.

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December 22.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

JAGRUP RAI AND OTHERS (DEFENDANTS) *v.* RADHEY SINGH AND OTHERS (PLAINTIFFS.)

Registered and unregistered documents—Priority—Mortgagee under registered deed competing with auction-purchaser at a sale under a decree on a prior unregistered mortgage-deed—Act III *of* 1877 (*Registration Act*) *s.* 50.

Under s. 50 of the Registration Act the decree or order which is not to be effected by a registered document must be a decree or order made prior to the execution and registration of the registered document. Therefore where the plaintiffs, who were mortgagees under a registered instrument, sued to set aside a sale to the defendants under a decree on an unregistered mortgage, the plaintiffs' registered mortgage being subsequent to the unregistered mortgage on which the defendants relied, but prior to the decree thereon—*held* that the defendants, auction-purchasers, must take subject to the rights of the plaintiffs as mortgagees. *The Himalaya Bank Limited* v. *The Simla Bank Limited* (1), *Madar Saheb* v. *Subbarayalu Nayudu* (2), *Kanhaiya Lal* v. *Bansidhar* (3) and *Shahi Ram* v. *Shib Lal* (4) referred to.

THE facts of this case sufficiently appear from the judgment of Edge, C. J.

Mr. *Abdul Majid* and Mr. *Hamid-ullah*, for the appellants.

Munshi *Jwala Prasad*, for the respondents.

EDGE, C. J.—The plaintiffs were appellants here. They brought their suit to have it declared that a decree obtained on the 12th September 1882, on an unregistered bond of the 31st January 1877, and the auction-sale held under that decree at which the defendants purchased were null and void. The plaintiffs were mortgagees of the property. Their mortgage was dated the 5th December 1877, and was registered. On that mortgage they obtained a decree on the

(1) I. L. R., 8 All., 23.
(2) I. L. R., 6 Mad., 88.
(3) Weekly Notes, 1884, p. 136.
(4) Weekly Notes, 1885, p. 63.

19th December 1882. The question turns on s. 50 of the Registration Act. Now in this case the unregistered mortgage which was the basis of the defendants' title was prior in date to the plaintiffs' registered mortgage, but the plaintiffs' registered mortgage was prior in date to the making of the decree on the unregistered mortgage.

It appears to me that under s. 50 of the Registration Act the decree or order which is not to be affected by a registered document must be a decree or order made prior to the execution and registration of the registered document. The question was considered by this Court in *The Himalaya Bank, Limited*, v. *The Simla Bank, Limited*, (1), and it appears to me that I have come to the same conclusion as the learned Chief Justice and my brother Tyrrell did in that case with respect to the question of priorities. We cannot grant the relief asked for by the plaintiffs. The decree under which the sale took place was a perfectly good decree, the only thing is that it does not affect the plaintiffs' right to have it declared that it was subject to their lien. The decree that I shall propose will be that the appeal be decreed with costs and the suit of the plaintiffs' decreed to this extent that it be declared that the decree of the 12th September 1882, and the sale thereunder of the 12th March 1887 did not affect the rights of the plaintiffs under their registered mortgage of the 5th December 1877, and the decree thereon of the 19th December 1882.

STRAIGHT, J.—I am of the same opinion. I think that the law is very clearly stated on this point in the judgment of *Shahi Ram* v. *Shib Lal* (2) decided by Mr. Justice Oldfield and my brother Mahmood, and referred to in *The Himalaya Bank, Limited*, v. *The Simla Bank, Limited*, and the view therein held entirely coincides with the view just now expressed by the learned Chief Justice, and is also in accordance with the view I myself expressed in the case of *Kanhaiya Lal* v. *Banvidhar* (3). A like view is taken by the Madras Court in *Madar Saheb* v. *Subbarayalu Nayudu* (4). I also agree

(1) I. L. R., 8 All., 23.
(2) Weekly Notes, 1885, page 63
(3) Weekly Notes, 1884, page 136.
(4) I. L. R., 6 Mad., 88.

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in the order proposed by the learned Chief Justice and the form which the decree should take.

TYRRELL, J.—I also concur.

MAHMOOD, J.—I am also of the same opinion, and only wish to say that in the case of *Shahi Ram Shib* v. *Lal* (1) I had the honor of considering this question with Mr. Justice Oldfield, and the views which were then expressed were approved, as my brother Straight has pointed out, by Petheram, C. J., and my brother Tyrrell in the case of the *Himalaya Bank, Limited*, v. *The Simla Bank, Limited*, (2). Indeed, at page 28 a passage from that judgment is quoted which is of importance in this matter; and I give my concurrence all the more willingly, because now a Bench consisting of the whole of this Court as now constituted has approved it.

KNOX, J.—I agree with the learned Chief Justice.

Appeal decreed.

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December 11.

APPELLATE CIVIL.

Before Mr. Justice Mahmood.

BISHEN DAYAL (JUDGMENT-DEBTOR) *v.* THE BANK OF UPPER INDIA, LIMITED, (DECREE-HOLDER). *

Execution of decree—Party improperly brought on the record as representative of deceased Judgment-debtor—Appeal—Costs—Civil Procedure Code, ss. 2, 244, *cl.* (c). 540.

One B. D. was made a party to an application for execution of a decree as one of the representaives of a deceased judgment-debtor. It had been decided in a previous suit that B. D. was not related to the judgment-debtor in such a manner that he could become his legal representative, and in this proceeding also he objected that he was not such representative, and his objection was allowed and the order allowing it remained unappealed and became final. The Court, however, while allowing the objection, did not give the objector his costs.

Held that the objector did not, by being improperly brought into the execution proceedings, lose his right of appeal, and further, that he could under the circumstances appeal on the question of costs alone.

* First appeal No. 196 of 1889 from a decree of G. J. Nicholls, Esq, District Judge of Cawnpore, dated the 24th August 1889.

(1) Weekly Notes, 1885, page 63. (2) I. L. R, 3 All. 23.

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The facts of this case are fully stated in the judgment of Mahmood, J.

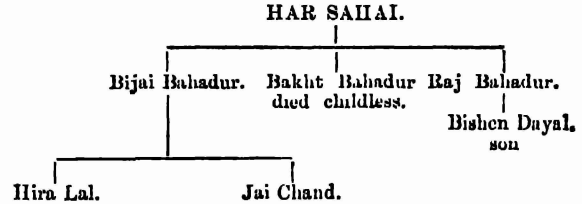
Munshi *Ram Prasad*, for the appellant.

Mr. *J. E. Howard*, for the respondent.

MAHMOOD, J.—This is a first appeal, purporting to have been presented to this Court under the provisions of cl. (*c*) of s. 244 of the Code of Civil Procedure, read with the definition of decree contained in the interpretation clause of s. 2 of that enactment (Act XIV of 1882), and as such the appeal must be regarded as one falling under the purview of s. 540 of that enactment.

When the case was originally heard by me, Mr. *Ram Prasad* appearing on behalf of the appellant, a preliminary objection was raised on behalf of the respondent that no such appeal lay. Another point was urged against the appeal, *viz.*, that even if the appeal did lie, the Court below had exercised a discretion vested in it by s. 220 of the Civil Procedure Code, and that discretion was not open, under the circumstances of this case, to interference by this Court in appeal, because the question related only to costs and not to the substantial merits of the dispute between the parties.

In order to render the contention thus presented to me intelligible, and also because the learned Judge of the Lower Court in recording his judgment has in more than one instance mixed up the names of the parties, I consider it necessary to give the following tabular statement as representing the relative position of the parties whose names are important for the disposal of this appeal.



The family represented by the above table is a family of Sribastub Kayasthas, whose religious doctrines, apparently, are so undefined that it became necessary for Bishen Dayal, the son of Raj Bahadur, to

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sue the latter and other members of the family in order to establish that the family were Hindus and not Muhammadans, or at least that the Hindu law of inheritance applied to the family and not the Muhammadan law of the Kurán. This cause finally came up before a Division Bench of this Court, consisting of my brothers Straight and Tyrrell, who, in the case named *Raj Bahadur* v. *Bishen Dayal* (1) disposed of this question, and that report shows the exact decision at which the learned Judges arrived.

It is unnecessary for me to say more about that decision than that I have referred to it because it explains the preliminary circumstances of the question which I am going to decide in this case. The decision of the High Court was passed on the 22nd March 1882, and that decision became final and is so admitted by the parties.

Subsequently to this decision it appears that upon a hypothecation bond jointly executed by Bakht Bahadur and Bijai Bahadur, the Bank of Upper India, Ld., respondent in this appeal, obtained a decree on the 25th August 1884, and that decree, being a money-decree by enforcement of lien, also became final.

Bakht Bahadur died childless on the 14th April 1889, leaving, as the table which I have already stated shows, certain relatives, among others a brother, Raj Bahadur, the father of Bishen Dayal the present appellant before me.

Matters stood thus when on the 27th May 1889, the Bank, decree-holder, filed an application for execution under s. 235, of the Civil Procedure Code, for execution of the decree of the 25th August 1884, and in that application, acting apparently under s. 234 of the Code, the decree-holder represented the judgment-debtors to be Bijai Bahadur, the original debtor of the decree, and along with him Jai Chand and Hira Lal, as sons of the deceased Bijai Bahadur, and besides these Raj Bahadur and Bishen Dayal, described in the application as the heirs of Lala Bakht Bahadur, the deceased.

This application initiated the present litigation, and in the course thereof, among other matters which ensued, and to which I need not

(1) I. L. R. 4, All., 343.

refer, Bishen Dayal, the present appellant before me, came forward as an objector, alleging that he had been wrongfully impleaded, because he was not the heir of the deceased Bakht Bahadur, the judgment-debtor, nor in any manner liable to the decree of the 25th August 1884, which was being put into execution. In other words, he stated that he was in no manner concerned with the decree, either by dint of representing any interest of Bakht Bahadur, or otherwise, and that the action of the Bank, decree-holder, in thus impleading him was so wrong that he had been dragged into a litigation with which he had no concern.

This objection was, rightly or wrongly, decided in the Court below and resulted in an order passed by the lower Court in the following terms :—

"Bishen Dayal on his own objection is struck out of the record, the objectors bearing their own costs."

From this adjudication no appeal has been preferred by the Bank, decree-holder, and it must, therefore, be taken that the adjudication of the Court below as to Bishen Dayal having no interest as legal representative of the deceased judgment-debtor, Bakht Bahadur, under the decree of the 25th August 1884, is a final adjudication.

But Bishen Dayal, the objector, who had thus succeeded in the Court below, has preferred this appeal, and the learned argument which has been addressed on his behalf by Mr. *Ram Prasad*, has been considered by me, bearing fully in my mind the necessity for the Court of appeal not lightly to disturb an order as to costs made under s. 220 of the Civil Procedure Code.

I have said so repeatedly and wish to repeat it now that orders as to costs should not unnecessarily be made subject of appeal, because an appellate Court would not on slight grounds disturb the discretion of the Court of first instance.

But it seems to me that in this case the decree of this Court of the 22nd March 1882, which had not only been passed but had also been published in the Official Reports, in volume 4 of the I. L. R., Allahabad series, page 343, ought to have put the decree-

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holder upon caution as to whether or not Bishen Dayal was to be impleaded in the cause.

First of all, before I give effect to this circumstance, I must dispose of the preliminary objection to which I have referred, *viz.*, that no appeal lay in this case.

In the Full Bench case of *Seth Chand Mal* v. *Durga Dei* (1) I gave expression to the views which I still hold in a judgment to be found at pages 325 to 328, especially the observations made by me at page 326.

In the present case it has been argued on behalf of the respondent that because the lower Court has held that Bishen Dayal was not a representative of the deceased debtor Bakht Bahadur, therefore, he has no right of appeal at all, and much learned argument was addressed as to this matter. It seems to me that when this petition of the 27th May 1889, praying for execution, was filed, Bishen Dayal was already impleaded in the cause and no question arose over that petition as a petition for execution of decree. It was a *lis* of which the array of parties was distinctly stated in the petition whereby it was initiated; and, being so initiated, and the array of parties being such as that petition represented, the adjudication of the Court that the appellant was not the legal representative of Bakht Bahadur will not take away the right which cl (*c*) of s. 244, confers upon him, read with s. 540 of the Civil Procedure Code. What he says is that he was called the representative of a dead judgment-debtor, Bakht Bahadur, but he was not such representative, that he was a stranger to the suit and a stranger to the decree of the 25th August 1884, in which that suit resulted, that he had been wrongly dragged into Court by the erroneous behaviour of the decree-holder, and that, because of this, the Court rightly decided that he was a third party, and in consequence that he was released from such liability as might have arisen under that decree imposing burden upon him. I have no doubt that the words of the Civil Procedure Code give him the right of appealing in order to

(1) I. L. R., 12 All., 313.

complain of the costs which have not been awarded in his favour for having been thus wrongly impleaded.

Then as to the merits of the order itself. As a question of discretion, I hope it will always be remembered by Courts of Justice when exercising their jurisdiction under the discretionary power of s. 220, that when an innocent party is dragged into a *lis* and has to stand the brunt of a trial, he has to undergo much vexation of mind independent of expenses, for wrongly being dragged into a cause, and such circumstances are enough consideration for allowing at least such costs as the law allows to a successful litigant.

In this case the judgment of the learned Judge of the lower Court shows the repeated mistakes he has made over the relationship of the parties. I find the name of Bakht Bahadur on more than one occasion used instead of that of Bishen Dayal, and that Bishen Dayal has been wrongly described in the cause as a party to the litigation.

It was probable on this account that the learned Judge did not follow the general rule of the law that a successful party is entitled to his costs and that the mistakes of the opposite party are no reason for departing from the general rule. Indeed the proviso to s. 220 of the Civil Procedure Code itself gives the warning to the effect that there should be reason for any orders as to costs which do not follow the event. In the judgment of the learned Judge there are no reasons, other than that the Bank, decree-holder, was not sufficiently cautious to ascertain who were the parties against whom to proceed in the execution of their decree of the 25th August 1884.

I think I have said enough to show that the order of the Court below, so far as it relates to the costs of Bishen Dayal, objector, appellant before me, cannot be sustained. No other party has appealed, and therefore my order in this is case that this appeal, be allowed, that the order of the lower Court so far as it disallows the costs incurred by the appellant Bishen Dayal, be reversed, and that the Bank, respondent, bear the costs of the appellant in both the Courts.

Appeal decreed.

1891
January 5.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell and Mr. Justice Mahmood.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (PLAINTIFF) *v.* MADARI LAL AND ANOTHER (DEFENDANTS).

Practice—Set-off—Suit for balance of account—Civil Procedure Code, s. 111.

The defendant was lessee from Government of a bridge of boats over the Ganges under a lease for five years, the consideration for which was payable by instalments extending over the term of the lease. The lease contained, amongst other provisions, one to the effect that the Government, if it saw fit at the expiration of the lease to farm the bridge to any other contractor, should be bound to take over the lessee's plant at a fair valuation to be determined by arbitration; and another clause provided that "should the Government, however, see fit to cancel the lease during its currency with a view to substitute a pontoon bridge, or for any other cause for which the lessee is not responsible he well be entitled to compensation from Government for all losses." The lessee died before the expiration of the lease, and the Magistrate of the District, acting on behalf of the Government, proceeded to deprive his representatives of the use of the bridge and to seize the stock and materials. The Magistrate then directed two persons to assess the value of the stock, which was ultimately fixed at Rs. 10,900. The Magistrate added a percentage, bringing the total amount up to Rs. 12,100; and a suit was filed on behalf of Government against the representatives of the deceased lessee giving credit to the defendants for such amount, and claiming the balance due in respect of the last two instalments under the contract.

Held that the sum of Rs. 12,100 assessed in the manner above described could not strictly be regarded as a set-off. The suit was one for balance of account and the defendants were entitled to dispute the correctness of the plaintiff's estimate of the item allowed in their favor.

THIS was a reference to the Full Bench made by Straight and Mahmood, JJ., (by their order of the 10th February 1890), as to whether, under the circumstances detailed in the judgment of Edge, C.J., the defendants were entitled to dispute the correctness of the item given credit for to them by the plaintiff.

The facts of this case are fully given in the judgment of Edge, C.J.

Munshi *Ram Prasad*, for the appellant.

Pandit *Ajudhia Nath* and Pandit *Sundar Lal*, for the respondents.

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THE SECRETARY OF STATE FOR INDIA IN COUNCIL v. MADARI LAL.

EDGE, C.J.—This is a suit by the Secretary of State for India in Council to recover a balance of money alleged to be due under a lease, dated the 24th October 1873. The lease related to a bridge of boats over the Ganges in this neighbourhood. The lease provided that the lessee should pay the sum of Rs. 65,000 by certain instalments. The last instalment was to be paid off on the 30th September 1878, and the lease, which was for five years, would terminate on the 1st October 1878. That Rs. 65,000 was to represent the value of the plant which belonged to the Government, and by clause 4 of the lease it was provided that although the lessee might renew any portion of the plant which was unfit for work in order to keep the stock in good repair, "he should have no right whatsoever to transfer or dispose of it or any portion thereof until he has paid up the sale price in full, the Government retaining a lien on the stock so long as any portion of the sale price is due. Clause 17 of the lease provides that the Government if it saw fit at the expiration of the lease to farm this bridge to any other contractor should be bound to take over the lessee's plant at a fair valuation to be determined by arbitration. Clause 18 provides for a different event. It is as follows:—"Should Government, however, see fit to cancel the lease during its currency with a view to substitute a pontoon bridge, or for any other cause for which the lessee is not responsible, he will be entitled to full compensation from Government for all losses."

On the 24th June 1878, Kalka Prasad, the lessee, died. In the following July, the Magistrate of Allahabad, acting for the Secretary of State for India, deprived Kalka Prasad's representatives of the use of the bridge and seized all the stock and materials. On the 23rd August 1878, the Magistrate directed two gentlemen to assess the value of the stock. Those gentlemen assessed the value of the stock at Rs. 10,700. It was subsequently ascertained that there was a portion of the stock which was not included in that valuation. That omitted portion was valued at Rs. 200, increasing the valuation of these gentlemen to Rs. 10,900. The Magistrate added a percentage to that valuation and fixed the value of the

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entire stock and boats at Rs. 12,100. Neither the fifth instalment of Rs. 6,500 nor the final instalment ever was paid. The time never came to pay the final instalment, because, without any reason, so far as I can see, and during the currency of the lease, the Magistrate of Allahabad took it on himself to determine the lease and to deprive the lessee's representatives of such possession of the stock as they were entitled to under the lease. The Secretary of State for India in Council has brought this suit to recover a balance alleged to be due to him in respect of the final and penultimate instalments, after making an allowance for certain sums which he admits the defendants are entitled to take credit for. The eighth paragraph of the plaint is as follows:—"That on the expiry of the said lease the plaintiff saw fit not to renew the same, and thereupon, with a view to Government taking over the lessee's plant under the term of the said lease, the valuation of such plant was duly referred to arbitration and the value thereof determined by the arbitrators to Rs. 10,900." Now I have no hesitation in saying that the statements contained in that paragraph are the reverse of true. From beginning to end it is misleading statement. The taking of the plant out of the possession of the lessee's representatives took place in July 1878, the so-called arbitration, which was in truth no arbitration at all, took place in August, 1878, and the Magistrate of Allahabad passed his order dealing with figures on the 17th September 1878. Looking to the plaint, particularly at paragraph 8, one would think this was a case falling under clause 17 of the lease, namely, the clause which provided that Government should take over the lessee's plant at a fair valuation to be determined by arbitration in case of its seeing fit on the expiration of the lease to farm the bridge to any other contractor. The defendants contended before the Divisonal Bench that they were entitled to question the accuracy of the so-called valuation of Rs. 10,900 and to shew that the fair value of the stock and plant seized by the Government far exceeded that Rs. 10,900, which, according to the plaint, the Government were prepared to allow for it. On the other hand those who represented the Secretary of State here contended that the defendants were not entitled to show that the value of that stock and

plant exceeded the Rs. 10,900 mentioned in the tenth paragraph of the plaint. In my opinion this is not strictly a case of set-off or counter claim. The Secretary of State for India in Council, if he is entitled to maintain this suit, as to which I have under these circumstances grave doubts, asked for a balance alleged to be due to him on account between him and the defendants. That balance was arrived at, so far as this point is concerned, by the plaintiff, by admitting that the defendants were to be credited in the account with the value of the stock and plant seized by the representative of the Secretary of State, but by an utterly erroneous paragraph, namely, the eighth of the plaint, he endeavours to tie down the defendants to a valuation of 10,900 rupees, as if that was a sum which could not be questioned. In my judgment the defendants are entitled to show what the value of the plant and stock in question was with the object of showing that balance claimed by the plaintiff is not the true balance of the accounts between the parties. This is my answer to the reference.

STRAIGHT, J.—I entirely concur in the answer of the learned Chief Justice to the reference, which is entirely in accordance with the view I entertained on the hearing of the appeal before my brother Mahmood and myself. As I said then so I repeat now, that it does not appear to me there is any difference between this case and a case in which, on a plaintiff coming into Court and seeking a balance of account from a defendant in which account certain amounts are credited to the defendant, the defendant, as part of his defence, says—"those credits which you have given in account are incorrectly stated."

TYRRELL, J.—I entirely concur with everything that has fallen from the learned Chief Justice.

MAHMOOD, J.—I also agree with the learned Chief Justice, but wish to add that the reference to the Full Bench was partly due to the doubt which I entertained as to the effect of s. 111 of the Code of Civil Procedure upon the pleadings of the parties and the facts of the case. I felt that the expression "an ascertained sum of money" which occurred in that section restricted its operation, as it

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undoubtedly does, to matters of set-off of a very limited kind, and excluding as it does counter claims as understood in the Judicature Acts in England it might preclude the defendant from proving in this action the value of the plant and boats which had been taken over by the Magistrate of Allahabad as stated by the learned Chief Justice. I am, however, now after having had the advantage of conferring with the learned Chief Justice and my learned brothers waived my doubt, and I have done so with special reference to the terms of paragraph 17 of the deed of the 24th October 1873, which, as the learned Chief Justice has explained, renders the dispute between the parties as to the value of the boats a question forming part and parcel of the claim, the matter being one which arises out of the same transaction as the claim. I think therefore that there is nothing in s. 111 of the Code of Civil Procedure to prevent our going into the question of the value of the plant. This is my answer to the reference.

PRIVY COUNCIL.

P. C.
1891
January 27.

RÁJA HAR NARAIN SINGH (DEFENDANT) *v.* CHAUDHRAIN BHAGWANT KUAR AND ANOTHER (PLAINTIFFS).

[On appeal from the High Court at Allahabad]

Arbitration under the Civil Procedure Code—Invalidity of award when not made within the time fixed by the Court—Civil Procedure Code, ss. 508, 514, 521—*Costs.*

When once an award has been delivered it is no longer competent to the Court to grant further time, or to enlarge the period for the delivery of this award under section 514 of the Code of Civil Procedure

Where an award was not made within the period fixed by the Court's order but was made after the date given in the last order extending the time for its delivery, *held*, that the award was invalid The decree of the Court dealing with the award as if duly made within the time, could not be treated as enlarging it.

The judgment in *Chuha Mal* v. *Hari Ram* (1) approved.

Order to be that the suit should proceed. Neither party to be entitled to costs in either Court below after the first judgment with regard to the stage at which the objection was taken; and the costs prior to that to abide the issue.

Present. LORD WATSON, LORD MORRIS, and SIR R. COUCH.

(1) I. L. R. 8, All., 548.

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RÂJA HAR NARAIN SINGH v. CHAUDHRAIN BHAGWANT KUAR.

APPEAL from a decree (16th December 1887,) affirming a decree (6th April 1885) of the Subordinate Judge of the Agra district.

This suit was brought by the respondents, the widow and mother of Chaudhri Bishambar Singh, deceased, against the appellant and two other defendants, to recover money and property alleged to have been deposited with them. The appellant denied having appropriated, or possessed, the property. On the 16th July 1884, the parties filed in the Court of the Subordinate Judge an agreement to refer all matters in dispute to the arbitration of Lalas Bansidhar and Jaganath Prasad, nominated by the plaintiffs, and Lalas Radha Prasad and Janki Prasad, by the defendant, with Lala Sakhan Das as umpire. On the 17th an order of reference, made by the Court, fixed the 19th August 1884 for the hearing of the suit by the Court. On the 9th August the time for the delivery of the award was extended to the 5th November, and again on the 4th November to the 30th. On the 5th December there was an application for further extension which was granted till the 5th January 1885, on which day a further extension was granted until the 19th January. The award was not, however, delivered till the 23rd March. It was in favour of the plaintiff for Rs. 29 431 payable by the Râja, defendant, he being the only one of the defendants whom the arbitrators held liable. His objections were heard by the Subordinate Judge. They did not include the objection that the award had been delivered after the expiration of the time for delivering it. The award was maintained by the decree, which was for the above amount, each party to pay their own costs.

From that decree the defendant appealed to the High Court. A division Bench (STRAIGHT and TYRRELL, J. J.) dismissed the appeal with costs.

The first objection taken in the High Court was that the award was not a valid one. The judgment, however, (having pointed out that the Court, which makes the reference, is intended by the Code to have complete control in the matter,) was that the direction to the Court to fix a time might be regarded as merely directory, not as

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mandatory And the conclusion of the Senior Judge of the Division Bench was the following :—

"At any rate, whatever defects there may have been in the order of the 5th January 1885, they were, in my opinion, defects that could be cured, and I hold that the adoption of the award must be taken to amount to an enlargement of the time for the delivery of the award to the date on which it was in fact delivered, and to a ratification of what had been done by the arbitrators. Moreover, no objection was taken by either of the parties to his acceptance of the award on the ground now urged, and it seems to me not unreasonable to assume that any such objection was waived by them."

On this appeal—

Mr. *J. H. A. Branson*, for the appellant, argued that the award not having been made within the period allowed by the Court, for that reason, was invalid. On three occasions the time fixed for the delivery of the award expired, without any award having been made, or any extension of time having been granted. No date had been fixed in the first instance, and on the last occasion when extension of time was granted, the time limited in the previous order of extension had already expired. Thus the last date was irregularly fixed, but even that had expired when the award was delivered.

He referred to *Nusserwanjee Pestonjee* v. *Meer Mynoodeen Khán*, wullud (1) decided on reference to the Bombay Regulation VII of 1827. Also to the Code of Civil Procedure, Act XIV of 1882, ss. 508, 514 and 521, and to the previous law in s. 318 of Act VIII of 1859. Also to the statute 52 and 53, Victoria, chapter 49, the Arbitration Act, 1889, s. 9, where the Court's power to enlarge the time, after the expiration of the time for making it, is expressly enacted for England, and to *Gunga Gobind Naek* v. *Kalee Prosunno Naek* (2); *Simson* v. *Venkatagopalam* (3); *Behari Das* v. *Kalian Das* (4); *Chuha Mal* v. *Hari Ram* (5).

Mr. *Lumley Smith, Q. C.*, and Mr. *Reginald Brown*, for the respondents, supported the decree of the High Court. They con-

(1) 6 Moo. I A, 134.
(2) 10 W R, 206
(3) I L R., 9 Mad 475.
(4) I L R., 8 All. 513.
(5) I. L. R, 8 All 518.

tended that the Court had power to enlarge the time and in fact had done so. If the appellant had at any time a right to the extensions made, that right had been waived. The sections of the Civil Procedure Code were directory; the appellant did not take his objection at the right time, and passed over the irregularity.

They referred to *Lord* v. *Lee* (1); *May* v. *Harcourt* (2). The Common Law Procedure Act 1854, (17 and 18 Vic. C. 125 s. 15.)

Mr. *J. H. A. Branson*, in reply, referred to *Mason* v. *Wallis* (3). Their Lordships' judgment was delivered by LORD MORRIS.

LORD MORRIS.—This case must, in their Lordships' opinion, be decided entirely upon the construction of the Civil Procedure Code, ss. 508, 514 and 521, and it does not appear that the construction of those sections can be very much aided by analogies drawn from sections of the English Common Law Procedure Act which have been referred to, dealing with arbitrations, because a specific rule has been laid down in the Code for dealing with arbitrations, probably grounded on reasons of public policy.

By s. 508 it is laid down that the Court shall by Order refer to the arbitrator the matter in difference which he is required to determine, and shall fix such time as it thinks reasonable for the delivery of the award and specify such time in the Order. In this case the Order of Reference made by the Court does not specify, directly, any time. It merely fixes a date for the hearing of the case by the Court, which is not in strict compliance with the terms of the section, though it might be sufficient. Their Lordships are of opinion that s. 508 is not merely directory, but that it is mandatory and imperative. S. 521 declares that no award shall be valid unless made within the period allowed by the Court, and it appears to their Lordships that this section would be rendered inoperative if s. 508 is to be merely treated as directory. In the present case, however, the Subordinate Judge repeatedly made orders enlarging the time, and in those orders fixed the time within which the award was to be made, although he did not do so in the original Order of

(1) L. R. 3 Q. B., 404. (2) L. R. 13 Q. B. D., 688.
(3) 10 B. and C., 107.

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Reference; and their Lordships are of opinion that it was competent for the Subordinate Judge to do so under s. 514 of the Code, which enables the Court to grant a further time and from time to time to enlarge the period for the delivery of the award, in cases when it cannot be completed within that period, from want of necessary evidence or from any other cause. The last order of enlargement made by the Subordinate Judge was on the 13th of March 1885, extending the time to the 20th of March 1885, and no longer. No award was delivered within that time, though one was delivered on the 24th of March 1885, and the first question which appears to their Lordships to arise is, whether it would have been competent for the Subordinate Judge to have extended the time after the award was made. Their Lordships are of opinion that it would not. When once the award was made and delivered the power of the Court under s. 514 was spent, and although the Court had the fullest power to enlarge the time under that Section as long as the award was not completed, it no longer possessed any such power when once that time was passed. The Court did, however, receive the award delivered on the 24th of March 1885, and a decree was made upon it by the Subordinate Judge, which was confirmed by the High Court. The objection now put forward for the appellant is that this award is not valid. That contention has to support it the express statutory enactment that no award shall be valid unless made within the period allowed by the Court. The utmost period allowed by the Court was until the 20th of March 1885, and therefore the award delivered on the 24th of March 1885 was so delivered by arbitrators who no longer had any lawful authority to make it. Again, as a matter of fact, there was no enlargement of the time made by the Court after the 20th March 1885.

This objection to the award was apparently not brought to the notice either of the Subordinate Judge or of the High Court. But the statute is there, and the Judges were bound to take judicial notice of it.

In the case of *Chuha Mal* v. *Hari Ram* (1) Mr. Justice Oldfield lays down the law upon this subject very clearly. He says—"The

(1) I. L. R., 8 All 548.

award in this case was not made within the period allowed by the Court, and consequently it must be held to be invalid; that is, there was no award on which the Court could make a decree." That judgment appears quite in point in this case, and it is a judgment of which their Lordships entirely approve.

Upon these grounds their Lordships will humbly advise Her Majesty to reverse the judgments of the Subordinate Court and the High Court, to declare the award invalid, and to direct that the suit shall be proceeded with, and that neither party shall be entitled to costs in either Court below from and after the date of the first of the said judgments; and that the costs prior to that date shall await the issue of the case. The respondents must pay to the appellant the costs of this appeal. The reason for not giving the appellant the costs in the Courts below arises from the fact that their Lordships are of opinion that the point upon which this award is now held to be invalid, was certainly not raised before the Subordinate Judge, nor, as far as appears, in the objections that were urged before the High Court.

Appeal allowed.

Solicitors for the appellant :—*Messrs. Barrow and Rogers.*

Solicitors for the respondent :—*Messrs. Linklater and Co.*

APPELLATE CIVIL.

1891
January 30.

Before Sir John Edge, Kt., Chief Justice, and Mr Justice Straight.

BISHNATH PRASAD (PLAINTIFF) *v.* JAGARNATH PRASAD AND OTHERS (DEFENDANTS).*

Limitation—Application for leave to appeal in formâ pauperis—Subsequent appeal in regular form—Payment of Court-fee on appeal no retrospective effect.

Where an application for leave to appeal *in formâ pauperis* having been presented and rejected, a regular appeal was subsequently filed, but after the period of limitation had expired.

* Second appeal No. 423 of 1890, from a decree of H. F. D. Pennington, Esq., Additional Judge of Ghazipur, dated the 3rd January 1890, confirming a decree of Munshi Lalta Prasad, Subordinate-Judge of Gházipur, dated the 3rd May 1889.

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Held that the payment of the court-fee on the regular appeal could not be held to relate back to the memorandum of appeal which accompanied the application for leave to appeal as a pauper, so as to convert that memorandum of appeal into a good appeal within time. Until the regular appeal was filed there was nothing before the Court which it could treat, even provisionally, as a memorandum of appeal.

In this case the plaintiff filed a suit in the Court of the additional Subordinate-Judge of Ghâzipur on the 24th September 1885. That suit was dismissed on the 10th May 1887. The plaintiff appealed; and the case was remanded to the lower Court for trial on the merits. Judgment was given on remand on the 3rd May 1889, and the plaintiff's claim was again dismissed. On the 22nd May 1889 the plaintiff presented to the District Judge an application for leave to appeal *in formâ pauperis*, accompanied, as required by law, by a copy of the proposed memorandum of appeal. That application was rejected on the 27th May. On the 31st May 1889, the plaintiff applied to the Judge to review his order of the 27th May. That application also was rejected on the 13th June. On the 22nd June the plaintiff applied to the High Court for revision of the Judge's order of the 13th June. The High Court disallowed that application on the 16th August. On the 25th August the plaintiff applied to the Judge to be allowed to file a regular appeal in respect of so much of the property claimed as would be covered by a court-fee of Rs. 10. That application having been allowed, the plaintiff paid in Rs. 10, and on the 19th September filed a regular appeal. When that appeal came on for hearing on the 3rd January 1890 it was dismissed as being barred by limitation. The plaintiff then appealed to the High Court, where it was contended that a memorandum of appeal, namely, that presented on the 22nd May 1889, was already before the Court, and that the payment of the court-fee would convert that memorandum into a good memorandum of appeal from the very date when it was presented along with the application for leave to appeal *in formâ pauperis*.

Mr. *Abdul Raoof* and Munshi *Gobind Prasad* for the appellant.

Munshi *Ram Prasad* and Pandit *Sundar Lal* for the respondents.

EDGE, C. J., AND STRAIGHT, J.—This is an appeal from a judgment of the Additional Judge of Ghâzipur, dated the 3rd January,

1890, by which he dismissed the plaintiff's appeal to his Court on the ground that it was not presented within the limitation period. The following are the dates material for consideration. The plaintiff-appellant brought a suit in the Court of the Subordinate Judge of Gházipur which was dismissed on the 3rd May 1889. The plaintiff-appellant then presented a petition under s. 592 of the Code of Civil Procedure for leave to appeal as a pauper, and that petition was accompanied by a memorandum of appeal as required by law. The Judge, acting in the matter as required by the second paragraph of s. 592, perused the judgment and decree of the first Court, and, being of opinion that they were not open to objection as being "contrary to law or some usage having the force of law" or as being "otherwise erroneous or unjust," on the 27th May 1889, rejected the petition. The plaintiff-appellant still had time up to the 13th June, within which to file an appeal on a properly stamped memorandum, but he did not do so; on the contrary he applied to the Judge for review of his order of refusal on the 31st May, and on the 13th June that application was also refused. On the 22nd June 1889, the plaintiff-appellant then came to this Court with an application for revision of the Judge's order under s. 622 of the Code of Civil Procedure, and that application was refused by this Court on the 16th August 1889. The plaintiff-appellant then went back to the Court of the Judge of Gházipur, and, on the 25th August, asked permission, while abandoning a portion of his claim, to be allowed to confine his appeal to so much of the property as would be represented by payment of the court-fee of 10 rupees. On the 17th September this prayer of the plaintiff was granted and on the 19th September the memorandum of appeal was filed and registered. It was in reference to these facts that when the appeal came to a hearing on the 3rd January 1890, the Judge who had to deal with it came to the conclusion that it was not presented within the period of time allowed by law, and it could not be regarded as an appeal until the 19th September 1889, when it was filed and registered. The contention which has been raised before us by Mr. *Gobind Prasad* on behalf of the plaintiff-appellant is that although the petition of appeal *in formâ pauperis*,

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dated the 22nd May 1889, was rejected on the 27th May, nevertheless there was already on the file of the Judge's Court a memorandum of appeal in respect of which that Court was competent to make orders granting time for supplying the deficiency in stamp, and that when the deficiency in stamp *pro tanto* was made good on the 28th August 1889, by the payment of 10 rupees, that payment acted retrospectively so as to make the memorandum of appeal a good memorandum of appeal from the very date on which it was presented along with the application *in formâ pauperis*. The learned pleader has laid much stress on the case of *Stuart Skinner* v. *William Orde* (1). That case has reference to Act VIII of 1859, as ss. 308 and 310, though I am not aware that in the present Code of Civil Procedure the provisions relating to pauper suits are materially different to those of the former Act, and, if we were dealing on the present Code with the same facts as appear in that case, we should probably have to hold ourselves governed by the ruling of their Lordships of the Privy Council. The case before us, however, is distinguishable. In the first place we have to deal with a memorandum of appeal, and in the next place we have to deal with a memorandum of appeal which accompanied an application to appeal *in formâ pauperis* which was refused. I am of opinion that when the petition to appeal *in formâ pauperis* was disallowed on the 27th May, the whole of that proceeding came to an end and that along with it fell the so-called memorandum of appeal which accompanied it. I do not think that a piece of un-stamped paper which only accompanied a petition to appeal *in formâ pauperis* could be called a memorandum of appeal. It was never a memorandum of appeal in the proper sense of the term which the Judge of the appellate Court could take cognizance of or make any order upon. Consequently, whatever directions were given by the Judge, either in his order of rejection of the 27th May, or of his refusal to review his judgment on the 13th June, were *ultra vires*. Mr. *Gobind Prasad* has urged that the provisions of s. 54 of the Code are applicable in the Courts of first appeal below. Conceding that it is so for sake of argument, he has not satisfied me that the

(1) I. L. R. 2, All, 241.

words "insufficient stamp" in paragraph 2 of s. 54 refer to or include a wholly unstamped paper. If this view were correct a litigant on the last day of limitation with what purported to be a plaint or memorandum of appeal written on a plain paper might come to a Court and insist on the Court receiving it for the purpose of making an order under s. 54, and thereby obtain an extension of the period of limitation. I think whenever insufficient stamps are used the Court may consider the memorandum of appeal under s. 54; but in this case the paper had no stamp, therefore it was not a memorandum of appeal and never became a memorandum of appeal until, at the earliest, the 26th August 1889, when Rs. 10 was paid into Court, though probably, strictly speaking, not till the 19th September, when it was filed and registered. Consequently, as there was no memorandum of appeal, we hold that the orders of the Judge of the 27th May and 13th June, were of no effect and that the filing and registration of the 19th September was long beyond the period of limitation. The appeal is dismissed with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Knox.

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February 3.

NASRAT-ULLAH (PLAINTIFF) *v.* MUJIB-ULLAH AND OTHERS (DEFENDANTS).*

Act XIX of 1873 (*N.-W. P. Land Revenue Act*) *s.* 113—*Civil Procedure Code s.* 13— *Question of title arising on an application for partition before a Revenue Court, how to be determined—Suit for declaration of right to partition—Res judicata.*

Where a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, and the decree has become, by lapse of time or otherwise, unenforcible, it is competent to the parties, or any of them, if they still continue to be interested in the joint property, to bring a fresh suit for a declaration of their right to partition. Such a suit will not be barred by reason of the former decree for partition, though that decree may operate as *res judicata* in respect of any claim or defence which was, or might have been, raised in the suit in which it was passed.

If a Revenue Court in disposing of an application for partition determines a question of title, it must, in so doing, act in conformity with the provisions of s. 113

* First appeal No. 27 of 1889 from a decree of Babu Brijpal Das, Subordinate Judge of Gorakhpur, dated the 28th February 1888.

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of Act XIX of 1873. If it disposes of the application otherwise than in the manner contemplated by s 113, its proceedings are *ultra vires* and will not debar the parties from suing in a Civil Court for a declaration of their right to partition.

THE facts of this case are briefly as follows :—One Kadir Bakhsh, the common ancestor of the parties, was the owner of the property in dispute consisting of twenty-seven villages. He died leaving a will by which he divided his whole estate into five equal shares. According to the plaintiff the villages were divided by private arrangement with the exception of four, namely, Ganeshpur, Rekua, Mahadeva and Aspur, which remained joint. In 1860 Miran Bakhsh, the father of the plaintiff, obtained a decree for partition to the effect that any inequality in the shares held by the various members of the family should be made up from the four villages above-mentioned, and the residue should be divided into five equal shares. It appears that that decree was never acted upon. In 1871 another order for partition was obtained by one of the share-holders, but that too seems to have remained inoperative. In 1883 the present plaintiff and others applied for the partitioning of Ganeshpur, and another share-holder, Musammat Hamira Bibi, for the partitioning of Rekua. Both these villages were divided, the partitioning of Ganeshpur being effected subsequently to the institution of the present suit. In 1887 the plaintiff brought the present suit alleging that his share was deficient by 300 bighas and praying that the deficiency might be made up out of the villages Ganeshpur, Aspur and Mahadeva, and that after the cancellation of the order for the partition of Rekua all four villages might be divided into five equal shares, or that the whole estate might be divided into five equal shares and one-fifth of it allotted to him. The Court of first instance dismissed the plaintiff's claim on three grounds :—(1) that as to the partition of Ganeshpur and Rekua the Court was not competent to interfere with the proceedings of the Revenue Court; (2) that the claim of the plaintiff was *res judicata*; and (3) that the suit was barred by limitation. The plaintiff then appealed to the High Court.

Mr. *C. H. Hill* and Pandit *Sundar Lal*, for the appellant.

Mr. *D. Banerji* and Maulvi *Mehdi Hasan*, for the respondents.

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EDGE, C. J. and KNOX, J.—The appellant here was the plaintiff below. All the defendants below were respondents here. The group of the defendants below No. 2 are represented here by Mr. *Banerji* and Mr. *Mehdi Hasan*. The other defendants-respondents have not appeared here and have not been represented. The suit was brought to obtain a declaration of the plaintiff's right to partition. His father had, in 1860, obtained a decree for partition against the persons whose representatives the defendants to this suit are. According to the plaint that decree for partition of 1860 was never carried into effect, and no partition took place. Whether that is true or not we need not now decide. The plaint further alleges that the defendants grouped as No. 2 conspired to prevent the plaintiff getting his full share, and, having colluded together, obtained an order for the partition of mauza Rekua in a manner contrary to his rights. The plaint also alleges, amongst other things, that the defendants caused the patwáris in the villages to record separate possession in respect of the joint villages. Some of the defendants admitted in their written statements the plaintiff's right to the partition, others disputed it. The defendants grouped as No 2 alleged that the claim was bad under s. 42 of the Specific Relief Act, and was barred by s. 13 of the Code of Civil Procedure. They alleged that in 1841, that is, long prior to the decree of 1860, the whole *ilaka* was privately partitioned. They further alleged, in paragraph 4, that their ancestor in his lifetime and they were in proprietary and exclusive possession. There are other allegations which it is not necessary to allude to now. The Subordinate Judge tried this case. He dismissed the plaintiff's claim on two main grounds. The first main ground being that s. 13 of the Code of Civil Procedure applied, the other main ground being limitation. He also apparently held that a partition which was made by the Revenue Court could not be interfered with by a Civil Court. To deal with the last point first.—A question of title was raised by the plaintiff in a partition proceeding before a Revenue Officer. That Revenue Officer had two courses open to him. Under s. 113 of Act XIX of 1873, he could have refused to proceed with the partition until the question of title and proprietary right which was

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in dispute between the parties had been decided by a competent Court, or he could have proceeded to inquire into the merits of the objection as to title. In the latter case he was bound himself to make the necessary inquiry, to take such evidence as might be produced, and to record a proceeding declaring the nature and extent of the interest of the parties applying for the partition and of any other party or parties that might be affected thereby. The procedure he was bound to follow in the latter case was the procedure laid down in the Code of Civil Procedure for the trial of original suits. He might, with the consent of the parties, refer any question arising in such case to arbitration. If he had proceeded to inquire into the merits of the objection in accordance with s. 113, his decision, when given, would, under s. 114, have been a decision of a Court of Civil Jurisdiction and would be open to appeal to the District Court or the High Court, as the case might be. Now the Collector adopted neither of those courses. He made some inquiry from the Settlement Department, and on the result of that inquiry, whether conducted by him or not we do not know, he came to the conclusion that the village he was dealing with, namely, Ganeshpur, was one of imperfect pattidári tenure and he proceeded to partition the village on that basis. We need not inquire at present whether the village was in fact one of imperfect pattidári tenure or not. That is a question yet to be decided in this suit. The plaintiff alleged that the village was one of pure zamíndári tenure. Coming to the conclusion at which he arrived, the Collector really was deciding a question of title. Mr. *Banerji* has contended that the Civil Court has no power to interfere in a case of a partition. The Civil Court is a Court of competent jurisdiction to decide questions of title. The Collector or Assistant Collector is not a Court of competent jurisdiction to decide questions of title unless he proceeds in the manner specified in s. 113 of the Land Revenue Act. In the case of *Muhammad Abdul Karim* v. *Muhammad Shadi Khan* (1) the question of the jurisdiction of the Collector in such matters was considered. The decision of the Collector under the

(1) I. L. R. 9, All., 429.

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above circumstances cannot disentitle the plaintiff to have his legal right declared in the Civil Court. The course adopted by the Collector precluded the plaintiff from questioning his decision by appeal to the District Judge or to this Court. That remedy not having been open to the plaintiff, he is entitled, under the circumstances, to maintain this suit and have his legal right declared. The next question is as to whether s. 13 of the Code of Civil Procedure applies in this case. Undoubtedly the decree of 1860 operates as *res judicata* to any claim or defence that was set up, or should have been set up, at that date, as for instance the allegation in the third paragraph of the written statement of the group of defendants No. 2, namely, "In 1248 fasli the whole of the *ilaka* was divided privately by the ancestors of the parties and from the date of the partition each party has held proprietary possession of the entire divided villages Ganeshpur, Rekua and Aspur without the interference of any other." That defence is not now open to the defendants. If that were a true statement of fact, it would, in the suit of 1860, have afforded grounds of defence. Whether it were then made or not is immaterial. To put it more plainly, the decree of 1860 settled the rights of the parties as they were at that date and cannot now be questioned. But that decree cannot operate as *res judicata* on any question arising as to rights of the parties acquired since that date. As for instance the defendants would be entitled to show that since that date they had obtained adverse possession, or that there was a partition in which no question of title was raised or other similar defences. It appears to us that when a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, it is competent for the parties or any of them, if they still continue to be interested in the joint property, to bring another suit for a declaration of a right to a partition in case their right to partition is called in question at a time when, by reason of limitation or otherwise, they cannot put into effect the decree first obtained. In this respect suits for declaration of right to partition differ from most other suits. So long as the property is jointly held so long does a right to partition continue. When a person having a right

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to partition and desiring to partition has his right challenged it appears to us he can maintain a suit for a declaration, provided his prior decree is not still enforcible. In the partition suit questions have arisen which could not have been determined in the suit which ended in the decree of 1860. The Subordinate Judge relied on certain decisions to which he refers in his judgment. On the question of *res judicata* it appears to us those authorities either do not apply or do not support the view which he adopted. The first of those in order of date is *Kishen Singh* v. *Dabeer Singh* (1). All that case decided was that a partition in the Revenue Court could not be enforced on a decree which by reason of lapse of time had become inoperative. The next case is *Doobee Singh* v. *Jowkee Ram* (2). That case to some extent supports the contention of the plaintiff here. There the Court decided that, notwithstanding that the plaintiffs had obtained a prior decree for possession, they would be entitled to maintain a suit for partition and separate possession, if since the date of the first decree they had been in possession of the undivided half share by that decree decreed to them. The next case was *Yaqoob Ali* v. *Khajeh Ubdoolrahman* (3). That case the Subordinate Judge has misunderstood. It has no application. The same observation may be made as to the fourth case relied on by him, namely, the case of *Sheikh Golam Hoosein* v. *Musumat Alla Rukhee Beebee* (4). In the course of argument we have been referred to the case of *Jagat Singh* v. *Durjan Lal* (5), which has some bearing on the questions dealt with by the Subordinate Judge. We have no doubt that if the plaintiff had drawn his plaint alleging the decree of 1860, and showing how he and the defendants were bound by it, that is, that they were representatives of the parties to it, and alleging that the state of things of 1860 continued up to the present, and alleging that the defendants or some of them resisted his right of partition, and asked for a declaration of his right to partition, that would be a claim to which even this Subordinate Judge would not have applied s. 13 of the Code

(1) N.-W. P. H. C. Rep., 1867, p. 272.
(2) N.-W. P. H. C. Rep., 1868, p. 381.
(3) N.-W. P. H. C. Rep., 1868, p. 383.
(4) N.-W. P. H. C. Rep., 1871, p. 62.
(5) Weekly Notes, 1884, p. 2.

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of Civil Procedure. The present claim is in effect such a claim as I have referred to, although not so in form. The last point we need refer to is that of limitation. The Subordinate Judge held that this suit was barred by limitation, because the defendants in the suit of 1860 had denied the plaintiff's right of partition and set up an adverse possession. He overlooked the fact that those issues were decided by the decree in that suit adversely to the defendants there. The question of limitation does not arise on the point suggested by the Subordinate Judge. It may be that some question of limitation arises from circumstances subsequent to 1860 and may have to be decided in this suit. We have not got the materials before us to express any opinion as to whether a question of limitation does arise. The Subordinate Judge in truth did not try the rest of the case, but he disposed of it on those preliminary points to which we have referred. That being so, we set aside his decree, and, under s. 562 of the Code of Civil Procedure, remand the case for trial on the merits and on such points of law as really arise. The costs here and hitherto will abide the result.

Cause remanded.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

1891
February 5.

NAMDAR CHAUDHRI (PLAINTIFF) v. KARAM RAJI AND OTHERS (DEFENDANTS).*

Mortgage—Prior and puisne incumbrancers—Puisne incumbrancer not made a party to suit upon prior incumbrance—His right to redeem not thereby affected.

If a prior incumbrancer, having notice of a puisne incumbrance, does not, when he puts his mortgage into suit, join the puisne incumbrancer as a party, that puisne incumbrancer's right to redeem will not thereby be affected.

Mohan Manor v *Togu Uka* (1); *Muhammad Sami-ud-din* v. *Man Singh* (2); and *Gajadhar* v. *Mul Chand* (3) referred to.

THE facts of this case are fully stated in the judgment of Straight, J.

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* First appeal No. 200 of 1889 from a decree of Maulvi Ahmad Hasan, Subordinate Judge of Gorakhpur, dated the 8th July 1889.

(1) I. L. R., 10 Bom. 224 (2) I. L. R., 9 All. 135.
(3) I. L. R., 10 All. 520.

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NAMDAR CHAUDHRI v. KARAM RAJI.

Pandit *Sundar Lal* and Maulvi *Ghulam Mujtaba* for the appellant.

Munshi *Jwala Prasad* and Munshi *Kashi Prasad*, for the respondents.

STRAIGHT, J.—This is a suit for possession brought under the following circumstances :—On the 9th July 1873, one Bhaiya Agar Singh executed a simple mortgage in favor of two persons named Beni Madho and Achambit Singh, for a sum of Rs. 22,000. Interests in 19 villages belonging to the mortgagor were charged, and among them were 6 as. 4 p. of a village called Sirsia. This mortgage may conveniently be termed mortgage No. I. On the 5th August 1874, the same mortgagor and others made a usufructuary mortgage of their property, including the whole of Sirsia, for a sum of Rs. 4,500 in favor of Pir Ghulam and Jurai; and there seems to be no doubt or question that those mortgagees obtained possession under their mortgage. To this latter mortgage, by a further advance about October 1874, a charge was tacked on, on the 9th October 1874. This may be conveniently called mortgage No. II.

With regard to mortgage No. I, of which, as I have stated, Beni Madho and Achambit Singh were the mortgagees, it appears that the proportions of the mortgage-money advanced were divided between them to the extent of two-thirds to Beni Madho and one-third to Achambit Singh. Some time prior to March 1880, the mortgagee, Achambit Singh, and his mortgagors came to a settlement to the extent of one-third of the mortgaged property, and to that extent the mortgage was apparently discharged and satisfied. Subsequently, on the 15th March 1880, Beni Madho put the remaining interest under the mortgage in suit, and obtained a decree against the mortgagor for Rs. 14,875. On the 24th December 1883, Beni Madho transferred his interests as decree-holder to two persons of the name of Sharif and Dular, who as assignees thereof took steps in execution, and in those execution-proceedings they came to an arrangement with their judgment debtor, mortgagor, to purchase the 6-annas 4-pies of the village of Sirsia for a sum of Rs. 5,684. That transaction was perfected by a private

sale, and it must be taken that that interest has now disappeared from and is no longer subject to the mortgage of 1873. The interest which those two persons had so acquired was on the 4th September 1887, assigned over to the plaintiff and that is his title. He, therefore, "*primâ facie*" is the holder of a title acquired at a sale under a prior incumbrance to that under which, as I will in a moment show, the defendants acquired their interests.

The mortgage No. II has never been put in suit, and it appears that Pir Ghulam and Jurai, the original mortgagees, are both dead, each of them leaving numerous heirs behind him. With regard to the heirs of Pir Ghulam, they, on the 20th September 1886, sold their one-half mortgagee interest under the mortgage of the 5th August 1874, to Musammat Karam Raji Kuari, the wife of Bhaiya Agar Singh, the mortgagor. The consideration for that sale was a sum of Rs. 2,750, which was paid by an assignment to Vazir and others of the interests of Bhaiya Agar Singh along with a number of other persons in a village known as Sehri Sidhi, representing a sum of Rs. 1,751 accompanied by a bond of Bhaiya Agar Singh alone, mortgaging a zamindári interest of his for the payment of Rs. 999.

As to the share of Jurai of the mortgage of the 5th August 1874, that was, on the 18th October 1886, sold by the sons of Jurai also to Musammat Karam Raji for a sum of Rs. 2,750. In this case also the consideration for the sale was represented by a cross-conveyance, by Bhaiya Agar Singh along with several other persons, of their interests in the village of Midai, representing a value of Rs. 2,450, and by a bond of Bhaiya Agar Singh alone for Rs. 300, mortgaging a zamindári share of his own. This represents the title of the defendants.

Now I have stated exactly the mode in which this litigation presents itself and how it comes about that the plaintiff, who represents mortgage No. I, seeks to have possession as against the holder of the interest under mortgage No. II. There can be no doubt, I think, that at the time of the suit which was brought upon the mortgage No. I, the mortgagee had notice of the mortgage No. II.

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Not only was that a registered instrument, but in addition to that the mortgage was of a usufructuary character, the mortgagees were in possession; and upon this point the learned Subordinate Judge below found in terms that the plaintiff in that litigation had knowledge and notice of the usufructuary mortgage.

It is said that at that time there being no Transfer of Property Act in force, and the provisions of s. 85 not being in operation, no obligation rested upon the plaintiff to include the parties to mortgage No. II in that litigation. Section 85 of the Transfer of Property Act, which is now in force, only applies a principle which was long before recognized by the Courts of this country, and is a principle to which in justice, equity and good conscience, it seems to me those Courts were bound to give effect. The learned pleader on behalf of the plaintiff-appellant has said that, looking to the precise nature of the circumstances under which the purchasers under the second mortgage transferred their rights to the defendants, it must be taken that the payment made to them was in fact a payment made by the mortgagor himself, and therefore it must be assumed that the mortgage of 1874 was satisfied and discharged, and the defendants have no right to take their stand upon that security, and claim any rights under it. It is to be noted in regard to this contention that the conveyances which represent the more substantial portion of the transfers from Bhaiya Agar Singh to those transferees were conveyances not by himself alone, but by himself in conjunction with several other persons; and I am not aware, as I have pointed out to the learned pleader on behalf of the appellant, who has put his points so clearly and well in this case, that there is any thing to prevent a mortgagor doing what the mortgagor in this case is said to have done, namely, assisting in finding funds for his wife to purchase the mortgagee interest, which the mortgagee was desirous to transfer. It does not appear to me that this contention has force or effect, and it cannot prevail.

Then comes the main and crucial point in the case; what are the rights of the parties in respect of their several mortgages. This matter is not without authority. It has been dealt with in the case

of *Mohan Manor* v. *Togu Uka* (1). It has been dealt with by my brother Tyrrell and myself in *Muhammad Sami-ud-din* v. *Man Singh*, (2) which latter ruling has been adopted and followed by the learned Chief Justice and my brother Brodhurst in *Gajadhar* v. *Mul Chand*, (3) and has also been adopted by myself in many rulings to which I have been a party in this Court. All those rulings are to the effect that if a prior incumbrancer, having notice of a puisne incumbrance, does not, when he puts his mortgage in suit, join the puisne incumbrancer as a party, that puisne incumbrancer is in no way affected or prejudiced by the decree in the rights which the Transfer of Property Act gives him to redeem the prior incumbrancer. If he has been left out of that litigation the puisne incumbrancer must be placed in the same position he would have held had he been a party to that litigation.

The defendant is the puisne incumbrancer admittedly. She is willing and ready to discharge all the obligations that the law reasonably calls upon her to discharge, and she is prepared to satisfy the amount which properly is proportioned to the 6 annas 4 pies of mauza Sirsia. It is not denied that Rs. 5,684 was the amount which, by private arrangement between the mortgagor—who must be presumed to have had the best regard for his interest, and the mortgagee, who must be presumed not to have paid more than a fair price—was paid for the purchase at the private sale of the 6 annas 4 pies. I have not heard one word that that was not a reasonable sum, and we are both agreed that that is the extent to which equity requires that the defendant should pay the plaintiff, if she is to retain possession of this particular share of mauza Sirsia. That being the view I take of this case, I think that the decree of the Court below was wrong, in that it called upon the prior incumbrancer, before getting possession, to pay out the puisne incumbrancer. I think that the position should have been reversed. I therefore decree the appeal and reverse the decision of the Court below, and declare that the plaintiff-appellant is entitled to possession of the 6 annas 4 pies share of Sirsia, subject to this condition

(1) I. L. R., 10 Bom. 224. (2) I. L. R., 9 All 125.
(3) I. L. R, 10 All 520.

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that if within 6 months from the date of this our decree, the defendant do pay into this Court the sum of Rs. 5,681 to the credit of the plaintiff, the plaintiff's suit will stand dismissed and the defendant will retain possession of the 6 annas 4 pies of mauza Sirsia. If the money is not paid within the stipulated period, the plaintiff's decree for possession will stand, and he will be entitled to enforce it according to law. In either event the parties will bear their own costs of this litigation.

TYRRELL, J.—I concur.

Appeal decreed.

REVISIONAL CIVIL.

1891
February 7.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Knox.

MAHABIR SINGH AND ANOTHER (PETITIONERS) *v.* BEHARI LAL AND OTHERS (OPPOSITE PARTIES). *

Act I of 1887 (*General Clauses Act*) *s.* 3, *cl* (13)—*Act XII of* 1887 (*Bengal, N.-W. Provinces and Assam Civil Courts Act*) *s.* 21, *cl.* (*a*)—"*Value of the original suit*"—"*Amount or value of the subject matter of the suit*"—*Jurisdiction*—*Civil Procedure Code, s.* 2—*Decree, definition of.*

For the purpose of determining the proper appellate Court in a Civil suit what is to be looked to is the value of the original suit, that is to say, the "amount or value of the subject matter of the suit." Such "amount or value of the subject matter of the suit" must be taken to be the value assigned by the plaintiff in his plaint and not the value as found by the Court, unless it appear that, either purposely or through gross negligence, the true value of the suit has been altogether misrepresented in the plaint.

An order of a District Judge returning a memorandum of appeal to be presented in the proper Court on the ground that the value of the suit is beyond the pecuniary limits of his jurisdiction is not a decree within the meaning of s. 2 of the Civil Procedure Code.

THE facts of this case sufficiently appear from the judgment of the Court.

Hon'ble Mr. *Spankie* and Mr. *C. H. Hill*, for the appellants.

Munshi *Ram Prasad* and Munshi *Kashi Prasad*, for the respondents.

*Miscellaneous application under s. 622 of the Civil Procedure Code.

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MAHABIR SINGH v. BEHARI LAL.

EDGE, C. J. and KNOX, J.—This is an application to us to exercise our powers of revision under section 622 of the Code of Civil Procedure.

The order to which this application relates was one by which the late District Judge of Gházipur returned a memorandum of appeal to the present applicants for presentation to this court. The District Judge declined to hear the appeal on the ground that the appeal lay to this Court and not to the District Court.

The suit out of which this appeal arose was one for pre-emption of a share in a village. The plaintiffs in their plaint valued the share at Rs. 4,000 and brought this suit in the Court of the Subordinate Judge of Gházipur. The defendants valued the share at Rs. 8,160. The Subordinate Judge having found the value of the share to be Rs. 7,464-10-3 made a decree for pre-emption on payment of that amount. From that decree the plaintiffs, who are the applicants here, filed an appeal in the Court of the District Judge. The District Judge, having found the value of the share to be Rs. 7,526, was of opinion that he had no jurisdiction to hear the appeal, and consequently passed the order to which this application relates.

Mr. *Kashi Prasad* for the respondents raised a preliminary objection that s. 622 of the Code of Civil Procedure did not apply, his contention being that either a first appeal from the order lay or that the applicants had a second appeal.

Mr. *Hill* for the applicants contended that no appeal lay from the order in question, and that this was a case within s. 622.

In First Appeal from Order No. 145 of 1889 we have to-day held that the order in question was not appealable as an order.

We are also of opinion that the order in question is not a decree as defined by s. 2 of the Code of the Civil Procedure. The order did not decide the appeal. On the contrary it was an order by which the District Judge, on the ground of jurisdiction, refused to decide the appeal and returned the memorandum of appeal to the

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appellants, so that they might have their appeal decided by this Court.

The construction to be placed upon the clause defining a "decree" in s. 2 of the Code of Civil Procedure was considered by this Court in *Balkaran Rai* v. *Gobind Nath Tiwari* (1). The question then arose—Had the District Judge jurisdiction to hear and determine the appeal? If he had, then he failed to exercise a jurisdiction vested in him by law.

That question turns upon the construction of the words "value of the original suit" in clause (*a*) of s. 21 of Act XII of 1887, read with clause (13) of s. 3, of Act I of 1887. By the latter clause—"value with reference to a suit shall mean the amount or value of the subject matter of the suit."

Mr. *Kashi Prasad* contended that "the value of the subject matter of the suit" is the value which may be found by the Court hearing the suit. On the other hand Mr. *Hill* contended that the "value of the subject matter of the suit" is the value stated by the plaintiff in his plaint.

There has been much difference of opinion in the courts in India, including this Court, on this question of how the jurisdiction is to be ascertained. It is a question not without difficulty.

It is, however, clear that by s. 21 of Act XII of 1887, the jurisdiction of the District Judge in appeal is to be determined by the value of the original suit and not by the value of the appeal. It appears to us that the "amount" of the subject matter of the suit mentioned in clause (13) of s. 3 of Act I of 1887 must mean the amount, that is, the amount in money, which the plaintiff claims to recover in his suit and not the amount which the Court may give him a decree for, and that for purposes of jurisdiction the amount of the subject matter of the suit must consequently mean the amount as stated by the plaintiff in his plaint.

It seems to us that the same principle must be applied when we have to ascertain the meaning of the "value of the subject matter

(1) I. L. R. 12, All., 129.

of the suit" in the same clause, and that the value of the subject matter of the suit must be the value as stated by the plaintiff in his plaint. The opinion which we express is that which was held by this Court in *Jag Lal v. Har Narain Singh* (1), and by the High Court at Bombay in *Lakshman Bhatkar v. Babaji Bhatkar* (2). The fact that in the Allahabad case s. 22 of Act VI of 1871 was in question, and that in the Bombay case the section in question was s. 25 of Act XIV of 1869 does not appear to us to make the decisions in these cases inapplicable as authorities on the subject which we are now considering. Mr. Justice Straight and Mr. Justice Tyrrell inform us that in a case which unfortunately has not been reported they held that the "value of the subject matter in dispute" within the meaning of s. 90 of Act VI of 1871 was the value stated by the plaintiff in his plaint. Whilst holding that the value of the subject matter of the suit for the purposes of jurisdiction is the value as stated by the plaintiff in his plaint, we entirely agree with the learned Judges in the Bombay case to which we have referred "that the jurisdiction of the Court properly having cognizance of the cause is not to be ousted by unwarrantable additions to the claim," and that an exaggerated claim which cannot be sustained and which there is no reasonable ground for expecting to sustain, brought for the purpose of getting a trial in a different Court from the one intended by the Legislature, is substantially a fraud upon the law and must be rejected, whether it arises from mere recklessness or from an artful design to get the adjudication of one Judge instead of that of another. The words which we have used are almost precisely those of the Bombay High Court Such a case as is referred to would be an instance of an attempt to evade s. 15 of the Code of Civil Procedure. The result is that as the applicants, the plaintiffs in the suit, had in their plaint valued the subject matter of their suit at Rs. 4,000, the District Judge had jurisdiction to hear and determine the appeal, and, as he failed to exercise the jurisdiction vested in him by law, we, under section 622 of the Code of Civil Procedure, make our order setting aside his order, the subject

(1) I. L. R. 10, All., 524. (2) I. L. R. 8, Bom., 31.

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of this application, and directing that the appeal be restored to the file of the pending appeals in the Court of the District Judge of Gházipur, and that it be disposed of according to law; and we further order that the costs of this application shall abide the result of the appeal.

Application allowed.

APPELATE CIVIL.

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February 10.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Knox.

MANGAL SEN (PLAINTIFF) *v.* RUP CHAND AND ANOTHER (DEFENDANTS). *

Suit pending in Court of Subordinate Judge with Small Cause Court powers—Transfer to Munsif's Court—Civil Procedure Code, s. 25—Act IX of 1887 (Provincial Small Cause Courts' Act) s. 35.

The plaintiff filed his suit as a Small Cause Court case in the Court of a Subordinate Judge having Small Cause Court powers During the pendency of the suit the Subordinate Judge took leave and his successor was not invested with Small Cause Court powers In consequence of this the District Judge made an order under s. 25 of the Code of Civil Procedure, transferring all cases above the value of Rs. 50 then pending before the Subordinate Judge in his capacity as a Small Cause Court, to the Munsif to be tried as Munsif's Court cases The Munsif had Small Cause Court powers up to Rs. 50. The plaintiff's suit was for Rs. 69. The case was accordingly tried by the Munsif and the plaintiff appealed, his appeal coming before the same Subordinate Judge before whom the suit was filed.

Held that, granted that the suit was a Small Cause Court suit (which was not decided), whether s. 25 of the Code of Civil Procedure or s. 35 of the Provincial Small Cause Courts Act (Act IX of 1887) was applicable, it would remain throughout a Small Cause Court suit and be subject to the incidents of such a suit.

THIS was reference from the Subordinate Judge of Saháranpur under circumstances which are fully detailed in the judgment of the Court.

EDGE, C. J. and KNOX, J.—This is a question referred to us by the Subordinate Judge of Saháranpur, under s. 617 of the Code of Civil Procedure. A suit was filed as a Small Cause Court suit in the Court of the Subordinate Judge of Saháranpur, the Subordinate Judge having had Small Cause Court powers conferred upon him.

* Miscellaneous application No. 112 of 1890, under s. 617 of the Civil Procedure Code.

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While the suit was pending before that Court, the Subordinate Judge went on leave. The gentleman who was appointed to officiate in the absence of the Subordinate Judge had not had conferred upon him Small Cause Court powers. The District Judge made an order transferring this suit and others to the Court of the Munsif of Saháranpur to be tried and disposed of as a Munsif's case. The Munsif had had conferred upon him Small Cause Court powers to the extent of Rs. 50. The suit in question was one for Rs. 69. The plaintiff being dissatisfied with the decree of the Munsif, appealed to the District Judge of Saháranpur, who transferred the appeal to the Court of the Subordinate Judge. In what we are going to say we are not deciding whether the suit was a suit of the nature of Small Cause Court suits or cognizable by a Court of Small Causes as such. That may be a question yet to be decided by the Subordinate Judge. We merely assume for present purposes that it was a Small Cause Court suit. On that assumption we give the following opinion :—It is not necessary to decide whether or not the decision in *Kauleshar Rai* v. *Dost Muhammad Khan* (1) was right in law and applies to this case. If s. 25 of the Code of Civil Procedure applies here, and the order was in fact made under that section, the last clause of that section would apply, and the Munsif, for the purposes of this suit, must be deemed to have been a Court of Small Causes competent to try it as such. The transfer to the Munsif's Court was made after the Subordinate Judge, who had Small Cause Court powers, had proceeded on leave. If, by reason of this fact, s. 25 of the Code of Civil Procedure did not apply, then we must apply s. 35 of the Provincial Small Cause Courts Act (Act IX of 1887). That section requires to be carefully looked at. It is quite possible that the Legislature may not have expressed in the section what it intended, but we must construe the section as we find it. Clause (1) of the section is as follows :—

"Where a Court of Small Causes or a Court invested with the jurisdiction of a Court of Small Causes, has from any cause ceased to have jurisdiction with respect to any case, any proceeding in

(1) I. L. R. 5, All., 274.

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relation to the case, whether before or after decree, which, if the Court had not ceased to have jurisdiction might have been had therein, may be had in the Court which, if the suit out of which the proceeding has arisen were about to be instituted, would have jurisdiction to try the suit."

The suit in the section referred to is a Small Cause Court suit, and the proceeding in the section is a proceeding in the Small Cause Court suit. The result is, according to our construction of the section, that when, by reason of a Small Cause Court ceasing to exist a suit is transferred to another Court, the proceedings still continue to be Small Cause Court proceedings, and for this purpose the Court to which the transfer is made must be treated as if it was a Court of Small Causes having jurisdiction to hear the suit transferred to it. In other words, whatever the intention of the Legislature was, we read s. 35 of Act IX of 1887 in the same sense that we read the concluding paragraph of s. 25 of the Code of Civil Procedure. With this expression of opinion the record will be returned to the Court of the Subordinate Judge of Saháranpur.

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February 11.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (PLAINTIFF) *v.* BHAGWANTI BIBI AND OTHERS (DEFENDANTS).*

Suit in formâ pauperis—Appeal—Right of Government to appeal in respect of Court-fee on portion of plaintiff's claim dismissed—Civil Procedure Code, ss 411, 412.

In a suit *in formâ pauperis* the District Judge decreed the plaintiff's claim in part and dismissed it in part, but omitted to make any provision for payment to Government of the court-fee on the portion which was dismissed. The Secretary of State, not having been a party to the litigation in the Court below, then preferred an appeal in respect of the court-fee on that portion of the plaintiff's claim which had been dismissed.

Held that such an appeal would lie; though the more suitable procedure would have been for the Government to have applied, through the Collector, to the Court of

* First Appeal No 125 of 1889 from a decree of W. T. Martin, Esq, District Judge of Mirzapur, dated the 16th March 1889.

first instance to review its judgment and to repair the omission in its decree. *Janki v. The Collector of Allahabad* (1) referred to.

Musammat Bhagwanti Bibi brought a suit *in formâ pauperis* against Hardeo Das, Ram Kishan, Murlidhar and Binda Prasad, three brothers and a nephew of her deceased husband, for the recovery of certain ornaments which she alleged to have been wrongfully retained by the defendants, and also for maintenance at the rate of Rs. 20 per mensem, the same being interest on a sum of Rs. 2,000, which, according to the plaintiff, had been left for her use in the defendant's shop under the will of her father-in-law, Sohan Lal. She also claimed Rs. 812 as arrears of interest on the said sum. The defendants denied the right of the plaintiff to bring her suit *in formâ pauperis*. They also pleaded that the will set up by the plaintiff was not binding on them, that they never had possession of any of the plaintiff's ornaments, and that the plaintiff had forfeited her rights to maintenance by reason of her unchastity, or if she was entitled to any, interest at the rate of 6 per cent, was sufficient. The Court of first instance found in favor of the validity of the will, and, fixing the rate of interest at 9 per cent. gave the plaintiff a decree for maintenance from the date of suit at the rate of Rs. 15 *per mensem*, dismissing the claim for arrears of maintenance and for recovery of the jewels. In framing its decree, however, the Court omitted to provide for the payment to Government of the court-fee on that part of the plaintiff's claim which had been dismissed.

An appeal was accordingly filed on behalf of Government to recover the court-fee on such portion of the plaintiff's claim.

Munshi *Ram Prasad* for the appellant.

The respondent was not represented.

STRAIGHT, J.—This appeal is of a very unusual character, the Secretary of State, appellant, having been no party to the litigation below and his right to appeal only constructively arising under the terms of ss. 411 and 412 of the Code of Civil Procedure. The respondent, Musammat Bhagwanti, who does not appear and is not

(1) I. L. R., 9 All, 64.

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represented, brought a suit against Hardeo Das, Ram Kishan, Murlidhar and Binda Prasad for recovery of arrears of maintenance amounting to Rs. 812, for restoration of ornaments withheld from her, valued at Rs. 4,000, and for a declaration of her right to future maintenance at the rate of Rs. 15 per mensem. The suit was instituted by the plaintiff as a pauper on the 2nd May 1888, and the learned Judge, having dismissed the first two items of the plaintiff's claim, gave her Rs. 172-8-0, being maintenance at the rate of Rs. 15 per mensem from the date of the suit to the date of the decree, and declared her right to maintenance thereafter at the rate of Rs. 15 per mensem. The decree, to be precise, was expressed thus :—"That Rs 172-8-0, due to the plaintiff on account of the maintenance from the 2nd April 1888, the date of the suit, to this day, be allowed to the defendants as the costs due to them in proportion to the amount dismissed, or Rs. 5,412, but that the defendants do pay out of the plaintiff's costs such amount as is payable by the plaintiff to the Government. Or in other words, a decree be passed in favor of the plaintiff for recovery of maintenance from this day at Rs. 15 per mensem, defendants being entitled to no costs. The defendants shall pay the plaintiff's costs in proportion to the amount decreed."

The effect of this decree is that the measure of the plaintiff's costs was declared to be the amount payable by the plaintiff to Government, and the measure of the defendants' costs was declared to be Rs. 172-8-0 arrears of maintenance decreed. It will thus be seen that in the decree of the learned Judge no provision was made for payment by any person to the Government of the court-fee on that portion of the plaintiff's claim which was dismissed, namely, Rs. 5,412, on which the court-fee would be Rs. 250. It is this omission in the decree of the learned Judge which is the subject of complaint in this appeal by the Secretary of State. I am constrained to say that in my opinion a most inconvenient course has been adopted, and that, instead of coming to this Court with an appeal, the proper method would have been for the Secretary of State, through the Collector of Mirzapur, to apply to the learned

Judge who passed the judgment and decree, to review his judgment and reframe the decree in such a way as to effect the object at which this appeal is aimed. Looking to the language of s. 411 of the Code of Civil Procedure, read with s. 412, I am not prepared to say that the Secretary of State cannot properly be regarded as a party to the litigation so as to be in a position to prefer such an appeal as that which is before us. In the case of *Janki* v. *The Collector of Allahabad* (1) my brothers Brodhurst and Tyrrell held that in execution-proceedings arising out of a pauper suit the Secretary of State who has obtained an order under s. 411 may be regarded as a party to the suit within the meaning of s. 244. I am not prepared to hold that that was an erroneous view, and, adopting the principle therein enunciated, it seems to me therefore that it was open to the Secretary of State, as being a party aggrieved by the decree below, to prefer this appeal.

When, however, I come to deal with the policy and propriety of such an appeal, I can only remark that I think we might well have been spared it. Musammat Bhagwanti apparently is a Hindu widow with such small means that she was constrained to come as a pauper to obtain the assistance of the Court for the purpose of wresting from the hands of the male members of her husband's family the small allowance of maintenance which has been decreed to her. The amount involved is, after all, to Government a very trifling one, and all the delay and expense that has been incurred in preferring this appeal might well have been avoided. However, we have no alternative but to administer the law as we find it. The terms of s. 412 are, in my opinion, mandatory, and it was obligatory upon the learned Judge below when he passed his decree to provide in that decree for payment by the plaintiff of the court-fees upon that portion of her claim which was dismissed, namely, Rs. 250. The result of this view is that the plaintiff will have to pay many months of her small maintenance allowance of Rs. 15 a month before she is quit of her liability to Government. Looking to her pauper position, I cannot help saying that I think the case was one

(1) I. L. R 9 All. 64.

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in which the Government might have refrained from preferring this appeal. The appeal is decreed, and the judgment and decree of the Court below are modified in this way that a declaration must be inserted in the decree to the effect that the sum of Rs. 250, court-fee payable in respect of that portion of the plaintiff's claim which was dismissed, is due from the plaintiff, Bhagwanti, to the Secretary of State, who will recover it in the same manner as the costs of suit are recoverable under a decree. The other defendants to the suit have been cited here as respondents for no earthly purpose or reason that I can see, because under s. 412 no power existed in any Court to order them to pay the costs of that portion of the claim of the pauper plaintiff which was dismissed. The appeal is decreed in part, *quâ* Musammat Bhagwanti, but without costs, and the decree will be amended in the manner I have indicated. As to the other respondents, the appeal is dismissed with costs.

TYRRELL, J.—I concur.

Appeal decreed quâ *Musammat Bhagwanti.*

Appeal dismissed quâ *the other respondents.*

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March 11.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

SRI NIWAS RAM PANDE (PLAINTIFF) *v* UDIT NARAIN MISR AND ANOTHER (DEFENDANTS). *

Mortgage-bond—Interest post diem—Damages—Act IV of 1882 (*Transfer of Property Act*) *ss.* 67 *and* 86.

Interest *post diem* on a mortgage-bond for a term certain and containing no express provision as to the payment of *post diem* interest is nothing else than damages for the breach of a contract.

Such interest cannot be regarded as a mere continuance of the *ad diem* interest due on the mortgage-bond, and, as such, as forming an integral part of the mortgage-debt, nor even as resembling such interest and forming a "charge" upon the property, though nominally damages. In respect of *post diem* interest given by way of damages no distinction is to be drawn between simple bonds and mortgage bonds. *Mansab Ali* v. *Gulab Chand* (1) and *Bhagwant Singh* v. *Daryao Singh* (2) followed; *Cook*

* First appeal No. 203 of 1888 from a decree of Babu Brij Pal Das, Subordinate Judge of Gorakhpur, dated the 7th September 1888.

(1) I. L. R. 10 All. 85. (2) I. L. R. 11 All. 416.

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v. Fowler (1); *Bishen Dayal* v. *Udit Narain* (2); and *Rajpati Singh* v. *Kesh Narain Singh* (3) referred to.

IN this case the plaintiff sued for himself and as heir to his deceased brother, Shiam Narain Pande, to recover the sum of Rs. 15,156 together with interest at the rate of 8 annas per cent. per mensem, in all Rs. 25,822 as. 7, from the defendants, Udit Narain Misr and Sarju Prasad Misr, by sale of property mortgaged under a bond dated the 8th September 1879. The debt secured by the mortgage was expressed to be payable with interest at 8 annas per cent. per mensem, in one lump sum at the expiration of two years for the date of the bond, but no provision was made for the payment of *post diem* interest. The defendants pleaded as their main ground of defence that the plaintiffs were not entitled to interest after the day fixed for payment of the money due under the bond. The Court of first instance gave the plaintiff a decree for the principal amount secured with interest for two years at the rate agreed upon, but dismissed the rest of the claim. The plaintiff then appealed to the High Court.

Pandit *Ajudhia Nath* and Munshi *Jwala Prasad*, for the appellant.

Munshi *Kashi Prasad* and Munshi *Ram Prasad*, for the respondents.

STRAIGHT and TYRRELL, JJ.—In this appeal by the plaintiff in the suit only two questions arise. The first is whether, upon a proper interpretation of the mortgage of the 18th December 1879, provision is expressly or impliedly made for the payment of *post diem* interest, and the second, whether, such a provision being absent, and the right of the plaintiff to such interest sounding in damages, such damages form an integral part of the amount due under the mortgage, and in that way should be regarded as secured thereby, or at least as money "charged" on the immovable property covered by the mortgage.

(1) L. R. 7. H. L. 27. (2) I L. R. 8 All. 486.
(3) Weekly Notes 1890, p. 149.

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Upon the first point I have no doubt as to the true nature of the instrument, namely, that it was for a term certain, *i.e.*, two years, within which period the principal, Rs. 15,156, together with interest at 8 as. per cent. *per mensem* was to be paid up in "a single sum;" and further, that it only provided for payment of interest "*ad diem*," and not "*post diem*." It says:—"in case of our being unable to pay the whole of the principal and interest due hereunder on the promised date, the said Pandeys, creditors, shall be at liberty to recover the principal and interest of this bond in a single sum and to a farthing by auction sale of the hypothecated property and from our other movable and immovable properties in any way they may like." In face of such terms as these, it seems to me impossible to say that any covenant for "*post diem*" interest can be implied, unless we are prepared to go the length of holding that when once the relation of mortgagor and mortgagee is established under an instrument for a specified term, there is always an imperative implication of such a covenant. There the mortgagors undertook to pay up the principal and interest within a specified time in "a single sum," and, if not paid upon that date, certain clearly defined consequences were to follow. It is not denied in the present case that the money was not paid as agreed, nor had it been paid up to the date of the institution of this suit on the 30th July 1888. I have no doubt that the claim of the plaintiff for interest after the 18th December 1881 could only be treated as one for damages to be assessed by the Court trying the suit and not for interest due under a covenant, express or implied. In *Cook* v. *Fowler* (1) Lord Cairns, after finding the instrument then in question to be a warrant of attorney and defeazance to secure a debt up to a certain day without any mention of subsequent interest, observes:—"If so, according to the well-known principle which has been referred to in many cases, and which may be taken most conveniently from a note to the case of *Mounson* v. *Redshaw*, any claim in the nature of a claim for interest after the date up to which interest was stipulated for would be a claim, really, not for a stipulated sum and interest but for damages, and then it would be for the

(1) L. R. 7 H. L. 27.

tribunal before which that claim was asserted to consider the position of the claimant and the sum which properly and under all the circumstances should be awarded for damages." In the same case Lord Selborne remarked :—"Although interest for the delay of payment *post diem* ought to be given, it is on the principle, not of implied contract, but of damages for a breach of contract." This view has been adopted and followed by this Court in *Mansab Ali* v. *Gulab Chand* (1); *Bhagwant Singh* v. *Daryao Singh* (2); *Rájpati Singh* v. *Kesh Narain Singh* (3); and *Bishen Dayal* v. *Udit Narain* (4). The first point is therefore decided against the appellant. Upon the second point Pandit *Ajudhia Nath* addressed to us a very able argument, the main object of which was to show that the cases of *Mansab Ali* v. *Gulab Chand* and *Bhagwant Singh* v. *Daryao Singh* decided by the learned Chief Justice and my brother Tyrrell and above referred to were wrongly decided, and that the question involved is one that we might well refer to a Full Bench. I have heard the learned pleader at length and have carefully examined all the authorities cited by him, and I not only see no reason to doubt, but I entirely concur in the judgments in those two cases and in the reasoning upon which they proceeded. As this opinion of mine, however, has the effect of committing at least a majority of the Court to a particular view, I think it well briefly to consider Pandit *Ajudhia Nath's* argument and the cases to which he has referred. His first position was that a broad distinction must be drawn between simple bonds and mortgage-bonds, as in the case of the latter an absolute presumption is always to be drawn that interest is intended to run on after due date as a charge on the property; and he laid stress upon the fact that in the case of *Cook* v. *Fowler* the document in suit was not a mortgage. At a subsequent stage of his argument the learned pleader admitted that he had perhaps put his contention too high, and he then urged that, conceding *post diem* interest to sound in damages, it was not to be regarded as damages in the ordinarily accepted sense, but as interest in fact, though damages in name, running *pari passu*

(1) I. L. R. 10 All. 85.
(2) I. L. R. 11 All. 416.
(3) Weekly Notes 1890 p. 149.
(4) I. L. R. 8 All. 486.

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with the interest stipulated for under the contract and in like manner entitled to be treated as secured on the property. Let me then examine this position. A man covenants to pay a sum of money certain, with an amount of interest certain, upon a date certain, and mortgages his land for the stipulated period as security for such principal and interest and declares it liable to sale in enforcement of the mortgage immediately on default at the expiration of the given period. Now I suppose the reasonable presumption is, first, that a man will perform his contract and not break it, and secondly, that if parties place a limit of time upon the engagement entered into between them, they do so with their eyes open and intend what they put in black and white into their contract. If, then, A says to B, "I will pay you Rs. 1,000 on the 1st January 1890, with interest at 12 per cent. per annum, meanwhile mortgaging to you my 4 anna zamindári share, and, if I fail to pay on due date, you may realize the amount by sale of such share," the presumption is that A intends to pay and B intends that he shall pay the Rs. 1,000 on the 1st January 1890, and that what is in contemplation between them is a fulfilment of the covenant as to payment on the date specified, and, if it is not fulfilled, an enforcement of the condition of sale. It is open to both of them to make provision for the case of default over and above what I have already mentioned by a covenant as to "*post diem*" interest, and if they do not do so, it must be presumed that the omission was intentional, and that the time to which the contract was limited was deliberately defined. What, then, is the special excellence that belongs to a contract of mortgage for a stipulated term in preference to any other contract to pay a sum of money certain on a particular date, such as a promissory note for example? In either case upon default of payment on due date the right of action accrues, because the time for performance has come and gone, and the contract has been broken. It seems to me, if effect is to be given to the contention of the learned pleader for the appellant, that no real distinction can be drawn between a mortgage for a fixed period, with a covenant as to interest limited to that period, and a mortgage with no such limitation but charging the property until repayment of prin-

cipal and interest, with the result that an express covenant for "*post diem*" interest has practically no higher scope or operation than an assessment by a Court of such interest under the name of damages, because, if he is right, in either case the *post diem* interest becomes a portion of the amount in respect of which the mortgagee may foreclose or sell the mortgaged property, or goes to swell the mortgage money a mortgagor must pay before he can redeem. In this view of the matter a mortgagee can allow his claim to *post diem* interest in the shape of damages to accumulate up to the last day of limitation, and, though the amount of it has in the end to be assessed and need not necessarily be any particular sum, it is when assessed to be regarded and treated as if it had all along constituted a charge or been secured on the mortgaged property. I would ask from what date such charge is to hold; from that of the mortgage, or from the breach, or from the end of each year for which interest remains unpaid, or from the date of the decree; and what is to be the position of a mortgagee who has taken an incumbrance subsequently to be date of breach, but prior to the bulk of the *post diem* interest, as damages, becoming assessable? If the interest *post diem* were recoverable as interest pure and simple, the recovery of it would be limited to three years from the date when it fell due (Act XV of 1877, sch. II. No. 63), yet if we push the argument for the appellant to its logical conclusion, upon the view that "*post diem*" interest assessed as damages becomes part of the "money secured by the mortgage," it is difficult to see from what point of time, for the purposes of art. 147, the money secured by the mortgage could be said to "become due." It seems to me a contradiction in terms to hold that something the mortgagor becomes liable to pay in consequence of his breach of contract can either legally or equitably be regarded as payable according to the terms and conditions of that contract. The learned pleader relied more particularly on the cases of *Morgan* v. *Jones* (1), *Price* v. *Great Western Railway Company* (2), *Gordillo* v. *Weguelin* (3), and certain passages to be found in Chapter XI,

(1) 22 L. J. Ex. 232. (2) 16 L. J. Ex. 87.
(3) L. R. 5 Ch. D. 287.

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Part 2, of Fisher on Mortgage. I have carefully looked into and examined all these authorities, and I am unable to regard them as making it incumbent on me to hold that interest accruing on a mortgage after the date fixed in the deed forms a portion of the "mortgage debt." In my opinion, on the contrary, it can only be recovered as damages for the detention of that debt, which damages cannot be treated as "secured by the mortgage" or "charged on immovable property," but as compensation for breach of the contract of mortgage. This is borne out by the note to *Mounson* v. *Redshaw* (1), which is mentioned by Lord Cairns in his judgment in *Cook* v. *Fowler*. "The usual covenant in a mortgage deed is to pay the interest and principal on a certain date, but there is no covenant after that date, therefore in debt on such a deed the interest subsequent to the day of default in strictness should not be claimed as part of the debt but as damages for the detention of the debt." The learned Pandit for the appellant pressed upon us the remarks of Lord Justice Amphlett in *Gordillo* v. *Weguelin* as indicating that the Court of Chancery would, in dealing with the question of redemption on equitable grounds, hold the mortgagor bound to pay *post diem* interest assessed as damages as a part of the amount payable by him before he could redeem. However that may be, the action of our Courts in such matters is guided and governed by the Transfer of Property Act, and I cannot hold the expressions therein of "mortgage money" (s. 67) or "principal and interest due on the mortgage" (s. 86) as covering and including interest "*post diem*," assessed as damages. It was said that this view will involve considerable hardship to a mortgagee, which I fail to see. Like every other party to a contract it is open to him on breach to proceed at once for the default, and the presumption is that he will do so, and not that he will lie by, for the purpose, as in this country we know, of allowing interest indefinitely to accumulate till it reaches an amount which, if given as damages assessed at the rate of interest on the mortgage-deed, will be far beyond what the mortgagor can pay. That this assessment need not necessarily adopt the contractual rate where it is abnormally

(1) 1 Wm. Saund. 201, n.

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high, or where there has been delay, is abundantly clear from the case of *Cook* v. *Fowler*, and it seems absurd to me to talk of there being any hardship to a mortgagee for a fixed term in putting him on the same footing in the matter of damages for breach of contract as any other party to a contract whose right to sue arises on such contract being broken. Moreover, it is open to a mortgagee at the time of the making of the contract of mortgage to have a covenant entered therein making provisions for "*post diem*" interest, and this is more frequently than not to be found in such contracts; if he does not do so he has no one but himself to blame.

I entirely concur in what was said by the learned Chief Justice in *Mansab Ali* v. *Gulab Chand* and *Bhagwant Singh* v. *Daryao Singh*, and I dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

1891
March 17.

Before Mr. Justice Tyrrell.

QUEEN-EMPRESS *v.* MUHAMMAD MAHMUD KHAN.

Sessions Court—Assessors—Assessors prevented by death or illness from attending a trial—Criminal Procedure Code, ss. 268 *and* 285.

During the course of a trial before a Sessions Court with three assessors, one assessor died at an early stage of the proceedings. Later on, another assessor became too ill to take any further part in the trial, and the third assessor was obliged to retire at the beginning of the accused's pleader's address to the Court and did not return until it was finished.

Held that the law contemplated the continuous attendance of at least one assessor throughout the trial. This condition not having been fulfilled, the proceedings before the Sessions Court must be set aside as having (with regard to the provisions of s. 268 of the Code of Criminal Procedure) been held before a Court not having jurisdiction.

THE facts of this case, so far as they are necessary for the purposes of this report, are stated in the judgment of Tyrrell, J.

Mr. *Pogose*, for the appellant.

The Government Pleader, Munshi *Ram Prasad*, for the Crown.

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QUEEN-EMPRESS v. MUHAMMAD MAHMUD KHAN.

TYRRELL, J.—A preliminary point was raised by the learned counsel who appeared for the appellants. He contended that the conviction of his clients was bad in law for want of jurisdiction in the Court below. The trial began before the learned Sessions Judge of Moradabad and three assessors on the 10th day of August 1890. This was in due conformity with the rule contained in s. 268 of the Code of Criminal Procedure, that all trials before a Court of Sessions shall be either by jury or with the aid of assessors. In an early stage of the trial one assessor died, and later on another assessor became too ill to take any further part in the trial. The trial reached its latest stage at the sitting of the 18th day of September 1890, when the assessor Govind Ram alone attended. The case for the prosecution having closed, and the examination of the accused and of some of their witnesses having been had, the learned pleader for the accused addressed the Court for about an hour and a half on the law and merits of the case. Before he had spoken more than ten minutes Mr. Govind Ram obtained leave from the Judge to leave the Court house on the plea of illness and consequent confusion of mind. He did not return till the address on behalf of the accused was finished, and having heard the Government Pleader reply for the prosecution he gave his opinion that the accused were guilty, on vague and unsatisfactory grounds. On these facts Mr. *Pogose* claims that the trial was bad with reference to ss. 268 and 285 of Act X of 1882. The point is new and of considerable importance. It is clear that a trial held by a Sessions Judge without any assessor would be bad for want of jurisdiction. It is equally certain that if all the assessors with whose aid a Sessions Court commenced a trial "are prevented from attending (throughout the trial) or absent themselves, the proceeding shall be stayed and a new trial" must be held. The question arises, however, as to what is the meaning of the words "prevented from attending, or absent themselves." Mr. Govind Ram attended throughout the most part of the trial and absented himself for a portion thereof only; but can he be said to have attended and not to have been absent in the substantial sense of s. 285? I have had the advantage of con-

sulting my brother Straight, and I am of opinion that this question must be answered in the negative.

The first part of s. 285 explicitly provides that the assessors shall attend throughout the proceedings, that is to say, that there shall be no break in their attendance, which shall be exactly commensurate with the entire continuance of the trial down to the time when the finding is made. In the case before me the portion of the trial covered by the provisions of s. 290, a very important portion from the point of view of the accused, was conducted without the aid of any assessor, and to that extent the attendance was not continuously complete. I must allow this plea, with the result that I am constrained to find that the trial was before a Court without jurisdiction and must therefore be set aside. The conviction, sentence and all other proceedings before me are annulled, and a new trial must be had according to law.

APPELLATE CIVIL.

1891
March 23.

Before Mr. Justice Mahmood.

KALYAN SINGH (PLAINTIFF) *v.* KAMTA PRASAD (DEFENDANT). *

Execution of decree—Attachment—Previous assignment in satisfaction of decree of third party—Suit by assignee to establish right to attached property—Civil Procedure Code, ss 258 *and* 283.

Where a regular suit under s. 283 of the Code of Civil Procedure was brought to establish the plaintiff's right to certain attached property, on the allegation that the property attached had been transferred to him in satisfaction of a decree held by him against the judgment-debtor,—

Held that it was not necessary that such transfer should be certified under the provisions of s. 258 of the Code of Civil Procedure. The prohibition to take cognizance of adjustments and payments referred to in s 258 above-mentioned relates only to the Court executing the decree.

The facts of this case sufficiently appear from the judgment of Mahmood, J.

* Second Appeal No. 1222 of 1889 from a decree of G. J. Nicholls, Esq., District Judge of Cawnpore, dated the 27th August 1889, reversing a decree of Babu Khettar Mohan Ghose, Munsif of Fatehpur, dated the 30th June 1888.

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KALYAN SINGH v. KAMTA PRASAD.

Munshi *Ram Prasad* and Munshi *Gobind Prasad*, for the appellant.

Maulvi *Mehdi Hasan* and Munshi *Jokhu Lal*, for the respondent.

MAHMOOD, J.—The facts of this case are the following :—

Kalyan Singh, plaintiff-appellant, obtained a money-decree for arrears of rent against one Bhurwa, who is stated to have been a tenant of the said Kalyan Singh. This decree was for a sum of Rs. 9 as. 15 p. 2, and dated the 11th July 1882. It is then stated that for the money due upon that decree and some other money due by Bhurwa to Kalyan Singh, the former transferred certain trees to the latter.

Against the aforesaid Bhurwa, the defendant-respondent Kamta Prasad also obtained a simple money-decree. This was some time in 1885. In execution of his decree Kamta Prasad attached the trees now in dispute. Thereupon Kalyan Singh objected to the attachment, upon the allegation that he was the owner of the trees and that the aforesaid Bhurwa no longer possessed any attachable or saleable interest in the trees. The Court executing the decree allowed the objections by its order dated the 14th January 1888; but on appeal that order was set aside on the 28th March 1888. The objections were thus disallowed and the attachment maintained.

Kalyan Singh thereupon instituted the present regular suit under s. 283 of the Code of Civil Procedure, suing to set aside the order of the 28th March 1888. This suit was filed on the 9th April 1888, and was decreed by the first Court; but upon appeal the lower appellate Court reversed the first Court's decree on the 27th August 1889, thus dismissing the suit.

By an oversight the learned Judge in delivering his judgment and decree wrongly used the name of Kalyan Singh, the plaintiff-appellant, instead of Kamta Prasad, the defendant-respondent, in whose favor he was passing the judgment. This matter, however, was brought to his notice, and the learned Judge, acting under the provisions of s. 206 of the Code of Civil Procedure, amended the

judgment and the decree by his order dated the 20th November 1889.

Whilst the matter stood thus, this second appeal was filed by Kalyan Singh to this Court on the 26th November 1889. The appeal was preferred against the decree of the lower appellate Court of the 27th August 1889, and in the grounds of appeal objection was taken to the error the Judge had made and afterwards corrected by the order of the 20th November 1889.

Mr. *Mehdi Hasan* has raised a preliminary objection that the appeal cannot prevail, because it has not been preferred from the final decree of the 20th November 1889. In view of this objection Mr. *Gobind Prasad*, the learned pleader for the appellant, has amended his memorandum of appeal by striking out the first and the fourth grounds of appeal and by inserting reference to the amendment as made by the order of the 20th November 1889. This he has been allowed to do under rule 22 of the rules of this Court. The preliminary objection is thus disposed of.

Upon the merits of the case the learned Judge has held that because the alleged transfer of the trees by Bhurwa to Kalyan Singh was made in satisfaction of the decree of the 11th July 1882, it was necessary, under s. 258 of the Code of Civil Procedure, that the aforesaid transfer and satisfaction should have been certified; that no such certification took place, and that therefore the alleged transfer cannot be taken into account even in the regular suit.

This view of the law is erroneous, and it is enough for me to refer to the case of *Ram Ghulam* v. *Janki Rai* (1) to show that the prohibition to take cognizance of payments in execution of decrees is limited to the Court which has to deal with the execution of the decrees and does not extend to Courts that have to try the allegations of the parties on the merits. In delivering my judgment in that case I expressed my dissent from some of the Bombay rulings therein referred to.

(1) I. L. R., 7 All. 124.

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KALYAN SINGH v. KAMTA PRASAD.

In support of my view Mr. *Gobind Prasad* has drawn my attention to the cases noted in the margin. I need not enter into a detailed consideration of these cases, because what I said in the case reported in I. L. R., 7 Allahabad, is enough to show that the prohibition to take cognizance of adjustments and payments referred to in s. 258 of the Code of Civil Procedure relates only to Courts executing the decree and to no others. Such, indeed, is the clear effect of the last few words of the section itself as they now stand.

Sellamayyan v. *Muthan* (1).
Pat Dasi v. *Sharup Chand Mala* (2).
Mallamma v. *Venkappa* (4).

In my opinion the learned Judge of the lower appellate Court, by reason of his having taken an erroneous view of the law, precluded himself from deciding the case upon its merits. The learned Judge has not considered the nature of the alleged transfer of trees by Bhurwa in favor of Kalyan Singh, nor has he considered whether the transfer is valid with reference to the rules of the Transfer of Property Act and the requirements of the Registration Law. It was further necessary to ascertain whether, notwithstanding such transfer, Bhurwa still possesses rights and interest in the said trees, and the nature and extent of such rights.

A proper adjudication of all these various points would be trial upon the merits. The learned Judge did not do so, having disposed of the case on a preliminary point, and having taken an erroneous view of the provisions of s. 258 of the Code of Civil Procedure.

I think the case should be tried on the merits as indicated above. I decree the appeal, set aside the judgment and decree of the Court below, and remand the case to that Court under s. 562 of the Code of Civil Procedure for disposal upon the merits. Costs to abide the result.

Cause remanded.

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(1) I. L. R., 12 Mad. 61. (2) I. L. R., 14 Calc. 376.
(3) I. L. R., 8 Mad. 277.

REVISIONAL CIVIL.

1891
March 31.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Knox.

JAWAHIR MAL (PETITIONER) *v.* KISTUR CHAND AND ANOTHER (OPPOSITE PARTIES). *

Execution of decree—Decree of appellate Court—What that decree should contain.

Where the judgment of an appellate Court directed that a certain sum over and above what had been decreed to him in the Court of first instance should be decreed to the appellant, but the decree of the appellate Court did not specify the sums that would be due to the appellant under that decree, except by reference to the judgment on which it was based and to the decree of the Court of first instance,—

Held that though the decree as thus drawn was informal, yet as the amount due to the decree-holder was ascertainable from the record, and the decree was thus practically capable of execution, execution should, as a matter of equity, be granted to the decree-holder.

This was a reference under s. 18 of the Ajmere Courts Regulation No. I of 1877, made by the Commissioner of Ajmere-Marwara upon the following facts :—

On the 22nd December 1883, one Jawahir Mal obtained a decree for Rs. 4,110-12-8 in the Court of the Subordinate Judge of Beawar. The decree-holder appealed to the District Judge against this decree, claiming an additional sum of Rs. 1,601-7-0. The appellate Court found in favor of the appellant, but omitted to enter the sum found in his favor in its decree. The first application for execution was made on the 4th December 1886, and it was ultimately struck off. On the 19th November 1889, a second application for execution was filed and the usual proceedings commenced. On the 21st October 1889, the decree-holder applied in the appellate Court to bring the decree of that Court into conformity with the judgment. That application was rejected on the 29th November 1889, on the ground that there was no reason for amendment of the decree. The execution proceedings initiated on the 19th November 1889 were terminated by an order of the 19th December, striking off the execution proceedings as barred by limi-

* Reference under s. 18, Ajmere Courts Regulation No. 1 of 1877.

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tation. From this order the decree-holder appealed, but his appeal was rejected. He then applied that a reference might be made to the High Court on the point of limitation and other legal questions which were considered to have arisen in the case.

The reference came before Edge, C. J., and Knox, J., who gave judgment as follows :—

EDGE, C. J., and KNOX, J.—This is a reference from the Commissioner of Ajmere. Jawahir Mal obtained a decree against Kistur Chand and another for Rs. 4,110-12-8 with costs. That decree was obtained on the 22nd December 1883. The defendants appealed, and their appeal was dismissed. The plaintiff also appealed and his appeal was allowed. The result of his appeal was that he obtained a decree for certain costs of the appeal and for a sum found by the Commissioner to be Rs. 1,601-11-7 in addition to the amount of the original decree. On the 4th December 1886 he applied for execution, and on the 19th February 1887 his application was struck off, on the ground that he had not complied with the direction of the Court to file an inventory of the property to be attached and on the further ground that he was not present. There is no doubt in our minds that the decree to be executed is the decree of the appellate Court. We are informed that Jawahir Mal applied to the appellate Court to bring its decree into accordance with its judgment, and that the appellate Court dismissed that application, being of opinion that the decree was in accordance with its judgment and the application unnecessary. If the decree of the appellate Court had been drawn up strictly in form, it should have shown in itself the ultimate relief granted, that is, it should have shown a decree in Jawahir Mal's favor, not only for the amount of the decree in the Court of first instance, but for the additional amount decreed in appeal by the appellate Court, and should also have shown the costs. The decree did not specify these amounts except by reference to the decree of the Court of first instance and to the finding of the Commissioner. Now, although this decree is not in form, still from the record it can be ascertained what the amount was, and in our opinion the informality in the decree which was the result of the

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manner in which it was drawn up in the office of the appellate Court, should not be allowed, where equity and good conscience are to guide us, to stand in the way of Jawahir Mal's obtaining execution for the amount found in his favor and for his costs. The application for execution was also informal, but we think it may be treated as an application to execute the decree in the case. It referred not only to the decree of the Court of first instance, but also to the decree of the appellate Court. Now as to the question of limitation. The application of the 4th December 1886, although it was struck off on the 19th February 1887, was still, in our opinion, an application for execution, or a taking a step in aid of execution within the meaning of art. 179 of the second schedule of the Indian Limitation Act, and therefore the present application is not time-barred. Owing to the view which we take and have expressed in this case it does not appear to us to be necessary to discuss the question as to the conflict between the decisions of the High Courts. With this expression of opinion we order the papers to be returned to the Commissioner of Ajmere-Marwara.

REVISIONAL CRIMINAL.

1891
April 3.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v.* R HAWTHORNE.

Criminal Procedure Code, ss. 191 *and* 342—*Magistrate taking cognizance of an offence on his own personal knowledge—Right of accused to have the case transferred—Power of Magistrate to question the accused.*

Where a Magistrate was found to have taken cognizance of an offence under cl. (*c*) of s. 191 of the Code of Criminal Procedure, *Held* that he had no power, on an application being made under the last clause of the section abovenamed, to refuse to transfer the case.

Held also that where a Magistrate, before evidence taken for the prosecution, put questions to the accused of the nature of a cross-examination, such procedure was illegal, as it could not be said that the questions were put "for the purpose of enabling the accused to explain any circumstances appearing against him in the evidence," within the meaning of s. 342 of the Code of Criminal Procedure.

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The facts of this case are briefly as follows :—

Robert Hawthorne was tried before the Superintendent of Dehra Dún and a jury on three charges under Act XXV of 1867 in connection with the printing and publishing of a newspaper known as " The Beacon " at Mussoorie. Prior to the issue of summons to the accused, certain correspondence had passed between the Superintendent and Assistant Superintendent of Dehra Dún and the accused, the former calling the latter's attention to certain provisions of Act XXV of 1867, the latter asserting that he had complied with them. The Superintendent of Dehra Dún also seems to have directed the police to make some inquiries in connection with the case, the result of which was embodied in a report, which, however, was not in the nature of a formal statement of facts constituting an offence alleged to have been committed by the accused. At the commencement of the trial the accused applied to the Court, under s. 191 of the Code of Criminal Procedure, for the transfer of the case, but his application was disallowed. It also appeared that before any evidence was taken in the case, the Court questioned the accused as to the charges against him, and used his answers as evidence against him in the course of the trial.

The accused was convicted on each of the charges and sentenced to fines which aggregated Rs. 500, or, in default of payment, to imprisonment amounting to two months and fifteen days.

The accused thereupon appealed to the Sessions Judge, who held that, though the procedure of the Magistrate was undoubtedly irregular, both as to his refusal to transfer the case and as to his examination of the accused, these were irregularities which could be and were cured by s. 537 of the Code of Criminal Procedure. The Judge, however, quashed the sentence of imprisonment altogether, as one not warranted by law, and in place of the original fine of Rs. 500 substituted a nominal fine of Rs. 5. The accused then applied to the High Court for revision of the Judge's order.

Mr. *A. Strachey*, for the petitioner.

The Public Prosecutor, Mr. *C. Dillon*, for the Crown.

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STRAIGHT, J.—I entirely concur with the learned Sessions Judge that the District Magistrate must be regarded as having taken cognizance of the case under cl. (*c*) of s. 191 of the Code of Criminal Procedure. It is patent from the record that there was no "complaint" or "police report," in the well-understood sense of the Code, and it is difficult to understand how the District Magistrate could even have brought himself to think that there was. It is clear to my mind that the process was really issued by him upon his personal knowledge and suspicion that an offence against Act XXV of 1867 had been committed. For this no possible fault can be found with him. On the contrary, it was his imperative duty to see that the provisions of a very salutary Act were complied with, and if they had been disobeyed that the offender should be punished. But the District Magistrate having, as I have no doubt he did, taken cognizance under cl. (*c*) of s. 191, he had no option or alternative but to grant the application of the accused to send the case to the Court of Sessions or transfer it for trial to another District Magistrate. The words "shall be entitled to require" are mandatory, and he could not refuse to comply with them. It therefore becomes unnecessary to examine the reasons given by him in his order of the 3rd October, though I may say I quite agree with the learned Judge that there is nothing in chapter XVIII of the Code which excludes or overrules the provisions of s. 191, cl. (*c*). That being so, the District Magistrate was, in my opinion, without jurisdiction and was not a "Court of competent jurisdiction," the error or defect in whose procedure could be cured by s. 537. In this respect, therefore, I differ with the learned Sessions Judge and am unable to sustain the District Magistrate's proceedings. Moreover, I am constrained to remark that it is impossible, upon a perusal of all that took place prior to the case being launched, not to feel that the Magistrate had a "personal interest" in the proceedings, and I must most emphatically express myself as to the impropriety and irregularity of the examination to which the accused was subjected on the 23rd August. The case was a warrant case and not a particle of evidence had been recorded, so that the power given by s. 342 of the Code to examine an accused "for the purpose of

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enabling him to explain any circumstance appearing in *the evidence* against him" had not come into play. A Magistrate has no right, in such a way as was adopted here, to elicit damaging or incriminating admissions from a person against whom he has issued process, for the purpose of afterwards treating them as evidence in the case, and chapter XXI of the Code gives no countenance to any such procedure. The impression left upon my mind upon a perusal of all the papers, is that the case was tried in too much of a storm, and that from the beginning to the end the Magistrate lost sight of the fact that one of the not the least important incidents in the administration of criminal justice "is to clear away everything which might engender suspicion and distrust of the tribunal, and to promote the feeling of confidence in the adminstration of justice which is so essential to social order and security" *Sergeant* v. *Dale* (1). It is, however, unnecessary for me to enter at large into the proceedings of the trial, being of opinion, as I am, that the accused having claimed his right under the last clause of s. 191 of the Code, the jurisdiction of the Magistrate was ousted.

I quash the conviction and fines in all Courts, and having regard to all that has taken place, I think no further action should be ordered by me or adopted by the local authorities. Any money that has been realised as fine should be refunded.

Before Mr. Justice Knox.

1891
April 4.

IN THE MATTER OF THE PETITION OF MALCOLM DECASTRO.

Criminal Procedure Code, ch. XV, s. 488—Order for maintenance of wife—Wife living apart from her husband for good cause.—Jurisdiction.

Where a wife, after a temporary absence from her husband on a visit, found on her return that he was living with another woman and thereupon left him and went to live in a different district and in that district applied for an order for maintenance against her husband,—

Held that, the wife being justified in refusing to live with her husband and in choosing her own place of residence, the neglect of her husband to maintain her was an offence within the jurisdiction of the appropriate Court at the place where the wife

(1) L. R. 2 Q. B. D. 558.

resided—*In re the petition of Shaik Fakrudin* (1) distinguished—*In the matter of the petition of W. B. Todd* (2) followed.

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IN THE MATTER OF THE PETITION OF MALCOLM DECASTRO.

The facts of this case sufficiently appear from the judgment of Knox, J.

Mr. J. Simeon, for the applicant.

Mr. C. Ross Alston, for the opposite party.

The Government Pleader (*Munshi Ram Prasad*), for the Crown.

KNOX, J.—On the 15th October 1890, Mary DeCastro, lawfully married wife of Malcolm DeCastro, applied under s. 488 of the Code of Criminal Procedure for an order directing her husband to make a monthly allowance for her maintenance and that of her three children. Summons to appear and answer to this application was served upon Malcolm DeCastro. It is evident from the record and as a matter of fact admitted by him that he made no appearance and allowed the case to proceed against him *ex-parte*.

From the statement on oath of Mrs. DeCastro it appears that she lived with her husband till the year 1881; that she went on a temporary visit to her sister, and on her return to her husband found herself compelled to leave him because he had a woman living with him.

Upon these statements the Magistrate of Allahabad passed an order for maintenance. Malcolm DeCastro now applies to this Court to revise that order on the ground that he was a resident of Ajmere at the time Mrs. DeCastro had made the application for maintenance, and consequently the Cantonment Magistrate of Allahabad had no jurisdiction to entertain the application. He put forward two other grounds as grounds why the order of the Magistrate should be revised, but they are grounds which entirely deal with facts, and, sitting as a Court of Revision, I see no reason to interfere with the Magistrate's finding on those facts.

There remains the question of jurisdiction. Mr. *Simeon,* who appeared for the petitioner, maintained that the only Court which had

(1) I. L. R. 9 Bom. 40. (2) 5 N.-W. P. H. C. Rep. p. 237.

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jurisdiction was the Court within the local limits of whose jurisdiction his client was actually residing at the date when the application for maintenance was instituted. He referred the Court to the case of *Fakrudin* (1).

Mr. *Ross Alston*, who appeared for Mrs. DeCastro, contended that the Magistrate of Allahabad had jurisdiction and that the case before this Court differed from that before the Court at Bombay. It was proved in the case before this Court that the wife had good cause for refusing to live with her husband, and in such a case she was at perfect liberty to choose her own place of residence. She had, moreover, the right to be maintained by her husband at the place of residence which she might choose, and if he failed to maintain her she had a right to institute her application for maintenance in the district in which she happened to reside.

The learned Government Pleader, who appeared in support of the Magistrate's order, drew attention to the case of *W. B. Todd* (2).

The question of jurisdiction is one which must be decided by the provisions of the Code of Criminal Procedure. The neglect to maintain a wife is an offence, inasmuch as it is an omission which is made punishable by the Code, and as an offence its place of trial must be determined by the provisions laid down in Chapter XV of the Code. In the present instance I am satisfied that Mrs. DeCastro has proved that her living apart from her husband was a lawful act, and that she was entitled to be maintained by him at Allahabad, which she had chosen as her place of residence. The neglect to maintain her was thus an offence committed within the local limits of the jurisdiction of the Magistrate of Allahabad. This is in accordance with the view taken by this Court in *Todd's* case, and I therefore find that the contention of want of jurisdiction fails.

The case before the Bombay High Court appears to have been based upon facts of a different kind.

The application is dismissed and the order of the Magistrate of Allahabad maintained.

(1) I. L. R. 9 Bom. 40. (2) 5 N.-W. P. H. C. Rep. p. 237.

1891
April 4.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

QUEEN-EMPRESS *v.* BUDH SEN AND ANOTHER.

Act XLV of 1860 (*Indian Penal Code*) *s.* 182—*Definition of offence provided for in s.* 182 *explained.*

In order to constitute the offence defined in s. 182 of the Indian Penal Code it is not necessary that the public servant to whom false information is given should be induced to do anything or to omit to do anything in consequence of such information. The gist of the offence is not what action may or may not be taken by the public servant to whom false information is given; but the intention or knowledge (to be inferred from his conduct) of the person supplying such information. *Golam Ahmed Kazi* (1) dissented from.

The facts of this case are fully stated in the judgment of Straight, J.

Mr. *W. Colvin*, Hon'ble Mr. *Spankie*, Mr. *A. H. S. Reid* and Pandit *Sundar Lal*, for the petitioners.

The Public Prosecutor, Mr. *C. Dillon*, for the Crown.

STRAIGHT, J.—This is an application for revision of an order in appeal passed by the District Judge of Aligarh on the 4th December 1890, affirming a decision of the Assistant Magistrate of the same place, dated the 17th November 1890, by which he convicted the two petitioners, Budh Sen and Narain Das, of offences under s. 182 of the Indian Penal Code and sentenced them respectively to undergo rigorous imprisonment for four months, and severally to pay a fine of Rs. 300, and in default of payment to suffer a further term of imprisonment for one month and fifteen days. The facts which have been found by both the lower Courts, behind whose findings in that respect I cannot go, are as follows:—The petitioners are banias by caste residing in different muhallas of the city of Aligarh, but having their places of business in Pidruganj. On the evening of the 24th August 1890, about 9 P.M., the then Magistrate of the district, who was out on duty in connection with the Muharram festival then going on, received a telegram which, no doubt, came from Budh Sen and Narain Das, couched in the following terms:—"Yesternight at one, two hundred Kasais Phopala, bearing lathis, attacked Kalyanganj, Pidruganj, for

(1) I. L. R. 14 Cal. 314.

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plunder and murder. Sadik Ali, Kotwal, Shiam Lal, Jamadar, dispelled them: there is danger from them to-night also: please arrange." The Magistrate in his evidence, which was given on the hearing of this charge, stated that he took no action on the telegram, as he did not believe the statements. Had he done so, he would have sent police to take care of the places mentioned in it. It is in respect of the sending of this telegram to the Magistrate of the district that the petitioners have been convicted under s. 182 of the Indian Penal Code. Mr. *Colvin*, who argued the petition for revision, has urged that it was a bad conviction in law, because there was nothing in the terms of the telegram to show that the persons who sent it intended to cause or knew it to be likely that they would thereby cause a public servant to use his lawful power to injure or annoy any particular person or persons, or to do or omit to do anything which he ought not to have done or have omitted to do had the true state of facts in regard to which such information was given been known to him. In support of his contention he has referred to the case of *Golam Ahmed Kazi* (1) and no doubt there the Chief Justice of Bengal remarks that as to s. 182, "that section must be read as a whole, and taken as a whole, we think it applies to those cases in which the police are induced upon the information supplied to them to do or omit to do something which might affect some third person and which they would not have done had they known the true state of things." If this view is correct it goes even further than the exigencies of the learned counsel's contention required; but, with the most profound respect for the learned Chief Justice and the Judge who agreed with him, I regret that I cannot concur in the opinion so expressed. It appears to me to proceed, first, upon an erroneous apprehension of the scope and object of s. 182 and the mischief at which it was aimed, that section appearing in the chapter relating to "contempts of the lawful authority of public servants," and, secondly, upon an erroneous construction of the language of the section itself. I cannot, having carefully examined the terms of the section, come to the conclusion that it is essential for the public servant mentioned

(1) I. L. R. 14 Cal. 314.

therein to have been induced to do anything or to omit to do anything. It is sufficient if the party charged gave information which was false, with the intention of causing or knowing it likely that a public servant would be caused to exercise his lawful power or authority to the injury of an individual, or to do or omit to do something which he ought not to do or omit to do were the true state of facts known to him. In other words, the criminality contemplated by s. 182 does not depend upon what is done or omitted to be done by the public servant on such false information, but what was, from the facts, the reasonable intention to be inferred on the part of the person who gave the false information. I also wish to remark that it seems to me that s. 182 contemplates two intentions on the part of the person giving the false information: first, the intention to cause or the knowing it to be likely that he will thereby cause a public servant to use his lawful power to the injury or annoyance of any person or persons, and, secondly, the intention to cause or the knowing it to be likely that he will thereby cause such public servant to do or omit to do some act, which, if the true state of facts were known to him, he would not do or omit to do. Applying this construction of the section to the facts of this case, I am quite unable to say that the convictions of these two persons were wrong. The Magistrate has said that if he had believed the statements contained in the telegram he would have sent police to take care of the places mentioned in it. The result would have been that he must have withdrawn police from other parts of the town, and, moreover, he might, with this telegram before him, have caused a considerable body of police to go into the Kasais' quarter to keep them in their houses and prevent them creating a disturbance. It is immaterial, however, to consider the precise nature of the action of the Magistrate; the question is, what action the persons who sent that telegram contemplated that the Magistrate would take? At least they intended and contemplated that the Magistrate would do some act, which, had he known the true facts, he would not have done.

In my opinion this is the kind of mischief at which the latter portion of s. 182 is aimed. Persons are not, by making reckless

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statements to a public servant, to bring the office of that public servant into contempt, and it is absolutely indifferent whether, by means of false information given with any of the intentions I have mentioned, he is or is not induced to do or omit to do any act. The criminality of the party is determined by his giving information which he knows or believes to be false with certain specified intentions to the nature of which I have referred. The convictions are most proper and should be sustained. The offence is a most mischievous one, particularly at such a time as this telegram was sent, when the relations between the Muhammadans and the Hindus of Aligarh were greatly strained and the magisterial authorities were placed in a position of great difficulty and delicacy to prevent friction and disturbance between these two sections of the community. False information given to the Magistrate at such a time, which might lead him to take action which, if he had known the truth, he would not have taken, might have led to most serious consequences, and it is well that people should understand that offences of this description will not be punished merely with a fine. The only thing to be said for these petitioners is that they did put their names to the telegram that was sent and that there was no difficulty in discovering its origin. I hope I am not showing undue leniency if, while rejecting the application for revision in its main details and sustaining the fine of Rs. 300, I reduce the term of rigorous imprisonment from four to two calendar months.

EDGE, C. J.—It appears to me that the High Court at Calcutta in the case of *Golam Ahmed Kazi* (1) read s. 182 of the Indian Penal Code as if no offence could be committed under that section unless the public servant referred to in it had been induced by information supplied to him to do or omit to do something which might affect some third person, and which he would not have done or omitted to do had he known the true state of things. I entirely agree with my brother Straight that the question whether the public servant was induced to take action or to omit to take action is abso-

(1) I. L. R., 14 Cal. 314.

lutely immaterial so far as this section is concerned. The offence is giving information which the informant knows or believes to be false and his intention thereby to cause or his believing or knowing it to be likely that he will thereby cause the public servant to use the lawful power of such public servant to the injury or annoyance of any person, or to do or omit anything which the said public servant ought not to do or omit if the true state of facts respecting which information is given were known by him. It appears to me that there may be many cases, which, in truth, may be cases of hoaxes, which would still come within this section; as, for example, suppose a man, knowing the statement to be untrue, but intending the Magistrate to act upon it, informed the Magistrate of the District that a violent fire was raging in a city in the District of which he had charge. Now if the Magistrate believed that statement he would naturally send as many police as he could spare to assist in quelling the fire and keeping order. He might possibly also ask for the assistance of the military, if there were any in the neighbourhood. That would be a perfect example of a hoax, and I have not a doubt that it would come within s. 182, whether the Magistrate acted upon the information or not. To take another example of a case which in my opinion would come within the section, although the public servant was not induced to taken action or to omit to take action upon the information given to him. Let us say that a man had absconded for an offence from Allahabad and that it was surmised that he would seek to escape at one of the shipping ports. Information of his having absconded would be communicated to those ports, Calcutta amongst the number. A person who, knowing that that man had not been arrested, and intending that the authorities at Calcutta should cease to watch the outward bound shipping, telegraphed to the authorities at Calcutta informing them that the absconder had been arrested elsewhere, would in my opinion have committed an offence under s. 182, although the public servant at Calcutta had not acted on the telegram but had persisted in his surveillance of the outward-bound shipping. I agree with my brother Straight that the intention of the Legislature was that a public servant should not be falsely given information with the intent

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that he should be misled by a person who believed that information to be false and was intending to mislead him. In this particular case, probably a sentence of two months' rigorous imprisonment and a fine of Rs. 300 will be sufficient to operate as a warning to others who may desire to give false information to public servants; and they may take this further warning that, if in future in similar cases the full penalty given under s. 182 is awarded, I shall hesitate before interfering with such a sentence. The application for revision to the extent of the punishment being reduced is allowed, otherwise it is rejected.

1891
April 7.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

DURGA DAI (OPPOSITE PARTY) *v.* BHAGWAT PRASAD (PETITIONER).*

Execution of decree—Act IV of 1882 (*Transfer of Property Act*) *s.* 90—*Nature of decree contemplated by that section.*

The plaintiff obtained a decree on a hypothecation bond, the decree providing that the money secured by the bond was to be realised by sale of the hypothecated property, and, if that proved insufficient to satisfy the decree, by sale of other property of the judgment debtor. The hypothecated property was sold and the proceeds were not sufficient to satisfy the decree. The decree-holder thereupon applied for enforcement of that portion of the decree which related to the other property of the judgment-debtor. To this application it was objected that it was necessary to obtain a decree under s. 90 of the Transfer of Property Act (IV of 1882). This objection was allowed and the decree-holder applied for and obtained a decree under the said section. The judgment-debtor then appealed against that decree on the ground, amongst others, that, looking to the terms of the original decree, the application under s. 90 was superfluous.

Held that the decree contemplated by s. 90 of the Transfer of Property Act is in fact an order to be obtained in execution of a decree for sale; and though in the present instance the application for such a decree may have been superfluous, it may nevertheless be regarded as an application for execution of a decree by enforcement of a portion of it against property other than the mortgaged property. *Miller* v. *Digambari Debya* (1) distinguished; *Hafiz-ud-din Ahmad v. Damodar Das* (2) and *Raj Singh* v. *Parmanand* (3) referred to.

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*First Appeal No. 70 of 1890 from an order of Babu Brijpal Das, Subordinate Judge of Gorakhpur, dated the 11th January 1890.

(1) Weekly Notes 1890, p. 142. (2) Weekly Notes 1889, p. 149.
(3) I. L. R, 11 All. 486.

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THE facts of this case sufficiently appear from the judgment of Straight, J.

Mr. *Abdul Raoof* and Munshi *Gobind Prasad*, for the appellant.

Mr. *J. E. Howard*, for the respondent.

STRAIGHT, J. (TYRRELL., J. concurring). This is an execution first appeal from an order of the Subordinate Judge of Gorakhpur, dated the 11th January 1890. On the 19th August 1882, one Lala Kunjbehari, husband of Durga Dai, appellant, executed an hypothecation bond for Rs. 5,000 in favor of the respondent. On the 26th October 1887, the respondent obtained a decree against Durga Dai, her husband being then deceased, upon the bond for Rs. 7,205 principal and interest, with a direction contained therein that the decretal amount was to be realised by sale of the hypothecated property, and, in the event of that proving insufficient, by sale of other property of the deceased obligor. On the 8th May 1888, the first application for execution was made and it was confined to an application for sale of the mortgaged properties. Objections were taken by a third party, but they were disallowed, and subsequently, by an order of the 21st September 1888, the Court held that the decree-holder must obtain an order absolute for sale. On the 26th February 1889 an order absolute for sale having been obtained, a further application for execution was put in, and, as it appeared that the property sought to be sold was ancestral property, the execution was transferred to the Collector, who, on the 21st July 1889, sold the properties for Rs. 5,600, which amount was insufficient to satisfy the amount due under the mortgage. On the 23rd September 1889 the decree-holder asked the Court to enforce that part of the decree which provided that, in the event of the mortgaged property being insufficient, the decree might be executed against other property of the judgment-debtor, mortgagor, and he prayed for attachment and sale of 2 annas of mauza Pindra and 2 annas of Baikantpur. On the 25th November 1889, Durga Dai filed objections, the only material one of which was the following :—"That the property against which the decree was passed

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enforcing hypothecation has been sold. Now other property not hypothecated cannot be sold until a decree under s. 90 of Act IV of 1882 be obtained." This objection was allowed on the 14th December 1889. On the 19th December 1889 the decree-holder asked that the decree under s. 90 of Act IV of 1882, might be framed for the balance of the decretal money, and that such balance might be realised. On the 11th January 1890, the Subordinate Judge ordered that the decree-holder be empowered to proceed for Rs. 3,976 by attachment and sale of the other property of the judgment-debtor, and on the same day a decree was formally prepared in accordance with s. 90 of the Transfer of Property Act. It is this proceeding of the Subordinate Judge of the 11th January 1890, that is made the subject of this appeal, and the only point seriously argued before us was that, as the decree itself provided further sale of other property than the mortgaged property in the event of the mortgaged property proving insufficient, no decree under s. 90 was necessary. This contention comes with very bad grace from the judgment-debtor, who, on the 23rd November 1889, successfully objected to a then pending application for execution of the decree as it stood, upon the ground that a decree under s. 90 was necessary. No doubt the object of this was patent enough: the judgment-debtor wishes to clear out of the way the application of December 1889, in hopes of successfully hereafter contending that any subsequent application for execution is barred by limitation. In my opinion the decree mentioned in s. 90 of Act IV of 1882 is one that is given in the execution proceedings arising under a decree for sale upon a mortgage and stands upon the same footing as an order absolute for sale, which the Full Bench of the Court has held to be a proceeding in execution. Even if it be contended by the judgment-debtor that the application of the 19th December 1889 was superfluous, having regard to the terms of the decree, I am not prepared to say that it may not properly be treated and regarded as an application for execution of a decree by enforcement of a portion of it against property other than the mortgaged property. In the course of the argument of this case, a ruling of my

own was referred to in the case of *Miller* v. *Digambari Debya* (1). I pointed out to the learned pleader for the appellant the inapplicability of that ruling to the present suit. What was held there was that if a mortgagee comes into Court upon an instrument which contains not only ordinary mortgage terms in reference to the immovable property but a personal covenant upon the part of the mortgagor, and, as part of the relief he seeks, asks for a decree declaring his rights personally against the mortgagor, the Court should not refuse to grant that relief upon such grounds as were stated in that particular case. There are also two rulings to which reference was not directly made, but which have some bearing upon the present case and they are reported in the *Weekly Notes* for 1889, pages 149 and 191. The former was one of my own, which I referred to in the case reported in the *Weekly Notes* for 1890, page 142. The other is a ruling of the learned Chief Justice and my brother Tyrrell, and in none of these rulings is there anything in conflict with the view that I am now expressing that the decree contemplated in s. 90 of the Transfer of Property Act is in fact nothing more nor less than an order to be obtained in execution of a decree for sale, when, under that decree for sale, the sale has taken place and has proved insufficient to satisfy the mortgage debt. Even if the application in the present case of the 19th December 1889 were looked as strictly as it professes to be, *viz*, for a decree under the terms of s. 90 of the Transfer of Property Act and for an order to attach and sell other properties of the judgment-debtor, I should not myself regard it as in any way invalidating or disturbing the legality or force of the decree itself as it originally stood.

In my opinion it would be a positive scandal to give effect to the contention now made, when it was by the action of the judgment-debtor herself that the order was made by which her objection succeeded on the 14th December 1889.

I dismiss the appeal with costs.

Appeal dismissed.

(1) Weekly Notes 1890, p. 142.

1891
April 9.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

BATAK NATH (DECREE-HOLDER) *v.* PITAMBAR DAS AND OTHERS (JUDGMENT-DEBTORS). *

Mortgage—Decree against the person and other property of the Judgment-debtor as well as against the property mortgaged—Act IV of 1882 *(Transfer of Property Act) s* 90.

In a suit for enforcement of a mortgage security the plaintiff prayed for a decree both as against the mortgaged property and also, in the event of the mortgaged property not realising sufficient to satisfy his claim, as against the other property and the persons of the defendants, and the decree which the plaintiff obtained was framed in accordance with the prayer in the plaint, that is to say, the decree expressly provided that, should the mortgaged property not realise sufficient to satisfy the amount decreed to the plaintiff, the other property of three, and the persons of two, of the judgment debtors were to be liable.

Held that such a decree could be executed against the persons and other property of the parties named therein, without its being necessary for the decree holder to obtain a separate decree under s. 90 of the Transfer of Property Act (Act IV of 1882).

Miller v. *Digambari Debya* (1) referred to.

The facts of this case, so far as they are necessary for the purposes of this report, sufficiently appear from the judgment of the Court.

Munshi *Madho Prasad*, for the appellant.

The respondents were not represented.

STRAIGHT J. (TYRRELL J. concurring).—This is an execution first appeal and it relates to execution proceedings in regard to a decree of the 17th December 1886. That decree was couched in the following terms:—"It is decreed and ordered that the plaintiff's claim for Rs. 6,251-8-0, with proportionate costs and interest due for the period of pendency at the rate of 8 annas per cent. on the principal amount, from this date on the whole, be decreed by enforcement of lien and sale of 5 biswas of Gadanpur; that if the property hypothecated be not sufficient, then the persons and the other property of Pitambar Das and Dhanpat Rai and the property of Chandan Lal will be liable; that the rest of the claim be dismissed."

It is to be observed that this decree was partly a decree for sale of mortgaged property by enforcement of a mortgage security, and

* First Appeal No 61 of 1890 from an order of Babu Ganga Saran, Subordinate Judge of Mainpuri, dated the 21st December 1889.

it also declared that, in the event of the mortgaged property being insufficient to pay the mortgage-debt when sold, the balance should be recoverable from the other property and person of the judgment-debtor. That decree is very similar in terms to one that was drawn up by my brother Mahmood and myself in the case reported in the *Weekly Notes* for 1890 at page 142.

When a Court passes a decree for sale under s. 88 of the Transfer of Property Act and that is the only relief asked for in the plaint, the decree should be limited to a decree for sale of the hypothecated property; and it is in that case that the subsequent contingency contemplated by s. 90 of the Transfer of Property Act arises. But here in the present case, having regard to the prayer in the plaint, provision was in terms made in the decree itself for what was to be done in the event of the proceeds of the sale of the hypothecated property proving insufficient to pay the mortgage-debt. With a decree so shaped the Court whose business it was to execute it had no option to go behind its terms, and when the condition precedent mentioned in it as to the enforcement of the decree against the person and other property of the judgment-debtor came into effect, it was bound to give effect to that provision and to enforce it against the person and other property. It was with this object and for that purpose that the decree-holder put in his application of the 14th December 1889, which was the subject of the Subordinate-Judge's order that is made the ground of this appeal. It was objected by the judgment-debtor that the decree-holder could not sell the other property of the judgment-debtor or proceed against his person for the unsatisfied balance of the mortgage-debt without first obtaining a decree under s. 90 of the Transfer of Property Act. I have already pointed out that, looking to the terms of the decree, no such further decree was necessary. But the Subordinate Judge, whilst he appears to have been of opinion that it was necessary for the decree-holder to have a decree under s. 90 of the Transfer of Property Act, refuses to grant him such a decree upon the ground that the grant of such a decree is purely discretionary, and that, having regard to the contention of the judgment-debtors—"That the mortgaged pro-

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perty purchased by the decree-holder is more in value than the whole sum due on the mortgage, and in proof of this fact they offer to pay up within a month the whole sum due, if the decree-holder gave up the property. * * * I would therefore presume that the decree-holder in fact has got all that he was justly entitled to."

This seems to me to be not only a wrong method of dealing with this execution proceeding, because the question of s. 90 of the Transfer of Property Act never entered into consideration at all, but a very insufficient reason for disposing of an application for a decree under s. 90. The Subordinate Judge's order in our opinion cannot stand, and, in decreeing this appeal and reversing the order of the Subordinate Judge, we direct that he take up the application of the 14th September 1889, and dispose of it according to law. The appellant will have his costs of this appeal.

Appeal decreed.

1891
April 23.

REVISIONAL CRIMINAL.

Before Mr. Justice Straight.

IN THE MATTER OF THE PETITION OF JAI LAL.

Criminal Procedure Code, s. 145—*Order for interim possession of immovable property—Point of time possession at which is to be looked at in determining which party is entitled to an order under s.* 145.

The possession which a Magistrate acting under s. 145 of the Code of Civil Procedure has to find and support, is possession at the time of the Magistrate's proceedings. Hence, where a Magistrate decided a question of possession under s. 145 upon evidence taken six months previously,—*Held* that such order was irregular and unsustainable.

This was a reference made by the Sessions Judge of Farakhabad under the circumstances stated in his order of the 23rd March 1891, which is as follows:—"This is an application for the revision of an order of Mr. C. D. Steel, Joint Magistrate of Farakhabad, purporting to have been passed under the provisions of s. 145, Criminal Procedure Code. From the record of the proceedings it appears that the Joint Magistrate made no inquiry as to the actual

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IN THE MATTER OF THE PETITION OF JAI LAL.

possession of the parties at the time the question came before him, but relied on an order passed by the Collector six months previously. That order, even if it could be relied on in these proceedings, does not clearly determine the question of actual possession by one or other of the contending parties, for the Collector observes:—'It seems to me that both are in possession, though perhaps not to an equal extent.' The ruling of the Bombay High Court in—*In the matter of Iluchapa and Shivagangava* (1) is in point.

In my opinion the order of the Joint Magistrate ought moreover to have been addressed to the person who asserted herself to be the owner of the land and not to her agent.

For the above reasons I report the case to the High Court with the recommendation that the Joint Magistrate's order be set aside, and that if he is still of opinion that a dispute likely to cause a breach of the peace exists, he be directed to decide the case after taking evidence as to actual possession. The Joint Magistrate's explanation is herewith submitted in accordance with the instructions contained in C. L. No. 2 of 1885."

The reference came before Straight, J., who passed the following order:—

STRAIGHT, J.—The Joint Magistrate's explanation does not meet the difficulty. He has decided the question of possession entirely upon the finding of the Officiating Collector of the 6th June 1890, which was no evidence of the issue he had to try, namely, which of the contending parties was in actual possession *at the time of his* (the Joint Magistrate's) *proceedings*. The Joint Magistrate would be well advised to carefully examine the terms of a section before he proceeds to act under it, as his irregularity of action in this matter has necessitated this reference by the learned Judge. I quash his order, but it will be open to the Joint Magistrate to hold a fresh proceeding if the required conditions still exist.

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(1) I. L. R. 15 Bom. 158.

1891
April 24.

APPELLATE CIVIL.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

MIRZA ANAND RAM (DEFENDANT) *v.* MAUSUMA BEGAM (PLAINTIFF). *

Landholder and tenant—Suit for rent where the right to receive it is disputed—Jurisdiction of Civil and Revenue Courts—Act XII of 1881 *(North-Western Provinces Rent Act) s.* 148.

M sued I and another for rent in the Court of the Collector. The defendants pleaded payment to V, who was accordingly brought on to the record as a co-defendant under s 148 of the North-Western Provinces Rent Act (XII of 1881). The Collector decided in favour of V. The plaintiff appealed to the Dist ict Judge making all three persons respondents. The District Judge reversed the decision of the Collecter and ordered the whole costs to be paid by V, who thereupon appealed to the High Court.

Held that the District Judge had no jurisdiction to entertain the appeal so far as the party brought in under s. 148 was concerned, and, that being so, had no power to award costs against him.

In this case the plaintiff, Musammat Mausuma Begam, sued two persons, named Ilahi Bakhsh and Abdul Rahman, whom she alleged to be her tenants, under s. 93, cl. *(a)* of the North-Western Provinces Rent Act (XII of 1881) for arrears of rent for the years 1291, 1292 and 1293 fasli. Her case was that the land in respect of which the rent was claimed had been her *sír* down to the end of 1292 fasli, when her proprietary rights had been disposed of to the Mahárája of Vizianagram, and that since that time she had held ex-proprietary tenant rights in the land, and was therefore entitled to receive the rents. The Maharája of Vizianagram intervened under s. 148 of Act XII of 1881, alleging that he was the person entitled to receive the rents and denying the plaintiff's ex-proprietary rights in the land. The defendants, Ilahi Bakhsh and Abdul Rahman, admitted the rent to be due and expressed their willingness to pay it to the person in whose favor the Court should decide. The Court of first instance (the Collector of Ballia) found that the defendants, Ilahi Bakhsh and Abdul Rahman, were not tenants of the plaintiff, and accordingly dismissed her suit. The plaintiff then appealed to the District

* Second appeal No 946 of 1888 from a decree of F. W Fox, Esq., District Judge of Gházipur, dated the 18th April 1888, reversing a decree of F. B. Mulock, Esq., Collector of Ballia, dated the 2nd May 1887.

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Judge, making the Mahárája, Ilahi Bakhsh and Abdul Rahman respondents. The District Judge found in favor of the appellant, and, reversing the decree of the Court below, gave a decree for the plaintiff for the amount claimed against Ilahi Bakhsh and Abdul Rahman and ordered the whole costs of the suit to be borne by the Mahárája. The Mahárája then appealed to the High Court.

Mr. T. *Conlan* and Munshi *Kashi Prasad*, for the appellant.

Hon'ble Mr. *Spankie*, for the respondent.

EDGE, C. J., and TYRRELL, J.—This is an appeal by the Mahárája of Vizianagram against so much of the decree of the District Judge of Gházipur, sitting as a Court of appeal in a rent suit as affected the Mahárája. Musammat Mausuma Bibi brought her suit against Ilahi Bakhsh and another for rent alleged to be due by them to her for land which had been her *sír* land. The Mahárája was brought in under s. 148 of Act XII of 1881. The Collector decided the case in favour of the Mahárája. The plaintiff appealed, making Ilahi Bakhsh, the other man, and the Mahárája respondents. The District Judge reversed the decision of the Collector, holding that the rent was payable to the plaintiff and decreed the whole costs of the suit and appeal to be borne by the Mahárája. The appeal so far as the question between the plaintiff and her two alleged tenants was concerned lay to the District Judge. The question raised in this appeal is whether, so far as the Mahárája is concerned, the District Judge had jurisdiction to entertain the appeal. If he had not jurisdiction to entertain the appeal, he had no jurisdiction to decree the costs of the suit and appeal against the Mahárája. There is a long current of rulings bearing on this question, some relating to the corresponding section of the former Act. The rulings do not appear to have been brought to the notice of the District Judge. We consider they are binding on us. We do not propose to discuss those rulings, all we need say is that we agree with them. The first of those is the case of *Chotu* v. *Jitan* (1). The next is the case of *Kishna Ram* v. *Hingu Lal* (2). Next is *Madho Prasad* v. *Amba-*

(1) I. L. R., 3 All. 63. (2) I. L. R., 4 All. 237.

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(1) and the case of *Govind Ram* v. *Narain Das* (2). Also there is a case decided in 1866, viz., *Musammat Thakoorayeen Bhagmanee Koonwar* v. *Syud Farzand Ali and others* (3). It appears to us that these cases are in point.

Following these authorities, we allow this appeal with costs and set aside so much of the decree of the Court below as affects the Mahárája of Vizanagram. We do not disturb the decree so far as it affects Ilahi Bhakhsh and Abdul Rahman.

Appeal modified.

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May 2.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Knox.

UMMI FAZL (DEFENDANT) v. RAHIM UN-NISSA AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, ss 522, 525—*Award—Decree on an award filed in Court, how to be framed—Appeal.*

When an award has been filed in Court, as provided by s. 525 of the Code of Civil Procedure, the judgment and decree based thereon must be drawn up specifically in terms of the award. If the decree merely decrees in general terms the claim of one party or of the other, it cannot be said that such decree is in accordance with the award, and being "not in accordance with the award" an appeal will lie therefrom.

The facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Pandit *Sundar Lal* and Mr. *Malcomson*, for the appellant.

Munshi *Ram Prasad*, Maulvi *Ghulam Mujtaba* and Maulvi *Mahmud Hussain*, for the respondents.

EDGE, C. J., and KNOX, J. An agreement of reference having been entered into between certain parties, the arbitrator appointed by that agreement made his award. Musammat Rahim-un-nissa, one of the persons interested in the award, applied to the Court of the Subordinate Judge of Saháranpur to have the award filed in Court. The application was made under s. 525 of the Code of Civil Procedure. In her application she also asked that a decree should be passed according to the award in her favor against the

* First Appeal No 38 of 1890 from a decree of Maulvi Sayyid Muhammad, Subordinate Judge of Saháranpur, dated the 13th November 1887.

(1) I. L. R., 5 All. 503. (2) I. L. R., 9 All. 394.
(3) N.-W. P., H. C. Rep., 1866 R. C. A. 20.

defendants, who were other parties to the arbitration. On the 13th of November 1889, the Subordinate Judge delivered a judgment and made a decree. So far as the filing of the award is concerned, it appears to us that that was a good order, but that we need not consider, as there is no appeal from an order directing an award to be filed. So far as that decree purports to be a decree under s. 522 of the Code of Civil Procedure, it was appealable if it was in excess of, or not in accordance with, the award. The decree was as follows :—"It is decreed and ordered that the plaintiff's claim be decreed with costs. The costs incurred by the defendants be borne by themselves except the defendant Zahur Muhammad, who shall get his costs from the plaintiffs. The plaintiff to get her whole costs from Musammat Ummi Fazl, the answering defendant. The rest of the defendants are exempted from the costs incurred by the plaintiff." That is not a decree as contemplated by s. 522 of the Code of Civil Procedure. A decree in general terms of that kind does not comply with that section. A Judge when proceeding under s. 522 of the Code to give judgment and make a decree, must give a judgment according to the award; that is, he must state in his judgment what his construction of the award is as to the rights and interests of the parties. He must say, for instance, that under the award the plaintiff is entitled to mauza A, the defendant is entitled to mauza B, and so on, and, having given that judgment, the decree must be drawn up in accordance with that judgment; that is, it must be a decree dealing with the specific rights of the parties, and not merely decreeing the plaintiff's claim in general terms, as was done here. When a decree so framed upon the judgment has been drawn up, the question whether an appeal would lie from it would depend on whether it was in excess of, or not in accordance with, the award. In the case of a decree in general terms, such as that in this case, a Court has no opportunity of judging whether the decree is in excess of the award. Certainly it is not in accordance with the award, because it defines specifically no rights and interests whatsoever. Errors of this kind by judicial officers would probably not arise if those officers, before proceeding under a particular section, took the trouble to read the section care-

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UMMI FAZL v. RAHIM-UN-NISSA.

fully, in order to ascertain what was the procedure the law required them to follow. We must set aside, as we do, the decree of the 13th November 1889, so far as it purports to be anything beyond an order for filing the award. We express no opinion on the merits of this case. The appeal is allowed on the one ground which we have considered. The other grounds, in the view which we take of this case do not at present arise. We remand the case under s. 562 of the Code of Civil Procedure to the Court of the Subordinate Judge, and direct him to dispose of the suit according to law. The costs of this appeal will be costs in the cause.

Appeal decreed.

1891
May 20.

Before Sir John Edge, Kt., Chief Justice and Mr Justice, Tyrrell.

CHAND MAL AND ANOTHER (PLAINTIFFS) *v.* ANGAN LAL (DEFENDANT) *

Suit by purchaser of decree to recover money of deceased Judgment-debtor in the hands of his agent—Limitation—Act XV of 1877 *(Limitation Act), sch ii, No.* 120.

ne A P, having certain moneys lying at his credit in Calcutta, empowered A L to receive the same and hold them on his behalf A P died at Moradabad, and subsequently to his death, the said moneys, which remained in the hands of A L, were attached by one of the creditors of A P in execution of a decree The decree holder sold his rights under the decree in respect of the moneys in the hands of A L to the plaintiffs, who sued to obtain the same from A L.

Held that the period of limitation applicable to such a suit was that prescribed by art. 120 of the second schedule of the Indian Limitation Act (Act XV of 1877).

Gurudas Pyne v. *Ram Narain Sahu* (I L R, 10 Calc. 860) referred to.

The facts of this case were as follows :---Narain Das, an ancestor of the plaintiffs, obtained a decree for a debt against Ajudhia Prasad, the elder brother of the defendant, on the 23rd July 1878, from the Court of the Judicial Assistant Commissioner, Peshawar, for Rs. 30,545-12-0. Nothing having been realised in respect of this decree, a certificate under s. 223 of the Code of Civil Procedure was obtained in 1881 for the execution of the decree in the district of Moradabad, of which Ajudhia Prasad was a resident, but it appears

* First appeal No. 29 of 1890 from a decree of Babu Anant Ram, Subordinate Judge of Moradabad, dated the 9th January 1890.

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that nothing was effected in pursuance of this certificate. Afterwards, on the 30th April 1884, another certificate was obtained from the Peshawar Court by one Damodar Das, as representative of the deceased decree-holder, Narain Das, and in pursuance of that certificate Chand Mal and Musammat Bhana Dai applied on the 20th August 1885 for execution of the decree in the Court of the Judge of Moradabad. They also applied for the transfer of the decree to the Court of the Subordinate Judge, and, Ajudhia Prasad having died on the 13th June 1883, for the substitution of his widow and minor sons as judgment-debtors. They further prayed that the amount of the debt to the extent of Rs. 9,635-4-9 might be recovered from Angan Lal, the brother of Ajudhia Prasad, he having received that money from the Commissariat Office at Calcutta as money due to Ajudhia Prasad. Notice was sent to Angan Lal, who objected. His objections were disallowed, and he thereupon filed a regular suit to get rid of his liability, alleging that the money in question had been paid over to Ajudhia Prasad. That suit was dismissed by the Court of first instance, but, in appeal the High Court reversed the decision of the Court below, on the ground that the proceedings taken by that Court against Angan Lal were without jurisdiction. The decree-holders in consequence attached the money in question in the hands of Angan Lal. Both Angan Lal and the widow of Ajudhia Prasad attempted to get rid of the attachment, but unsucessfully. The plaintiffs in the present suit purchased the debt due by Angan Lal on the 17th December 1888 and sued in the Court of the Subordinate Judge of Moradabad to recover the same. The Subordinate Judge found that the suit was barred by limitation under art. 62 of the second schedule of the Limitation Act (XV of 1877). The plaintiffs thereupon appealed to the High Court.

Pandit *Sundar Lal* and Babu *Rajendro Nath,* for the appellants.

Munshi *Ram Prasad,* for the respondents.

EDGE, C. J., and TYRRELL, J.—The only question which we need consider is a question of limitation. Angan Lal received a large sum of money as special agent for that purpose of Ajudhia Prasad,

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his brother. The money was received on behalf of Ajudhia Prasad. The money was attached in the hands of Angan Lal by a judgment creditor of Ajudhia Prasad; the plaintiffs became the purchasers of the rights of that judgment-creditor and they sought in this suit to recover the money from Angan Lal. It was contended on behalf of Angan Lal that art. 62 of the second schedule of the Indian Limitation Act of 1877 applies. If that article did apply, the suit was barred by time. On the other hand, on behalf of the plaintiffs-appellants, it was contended that art. 120 of that schedule was the only article which applied. If that article applies, the suit was within time, inasmuch as the plaintiffs appear to us to be standing, *qud* Angan Lal in the shoes of Ajudhia Prasad; we should have thought that the article of limitation, namely, art. 62, which would clearly have applied to a suit by Ajudhia Prasad, would also apply to the suit of the plaintiffs, but we have been referred on behalf of the plaintiffs to the case of *Gurudas Pyne* v. *Ram Narain Sahu* (1) as an authority to show that art. 62 would not apply here. In that case the plaintiff sought to recover money which had been received by the defendant for one Musammat Moti Dasi as the price of timber sold for her. The timber, in fact, was the timber of the plaintiff who had been wrongfully dispossessed by the husband of Musammat Moti Dasi. Then the defendant contended that art. 60 of the second schedule of the Limitation Act of 1871 applied.

That article is word for word the same as art. 62 of the second schedule of the present Act. Their Lordships held that as the defendant was, when selling the timber, acting as the agent of Musammat Moti Dasi, and as he received the money for her and not for the plaintiff, art. 60 of the second schedule of the Limitation Act of 1871 did not apply, and that the article which did apply was art. 118 of the schedule, which article corresponds with art. 120 of the second schedule of the present Act. When we regard the specific words used by their Lordships of the Privy Council in that case when explaining that art. 60 did not apply, and having regard to the fact that Angan Lal received the money for Ajudhia Prasad,

(1) I. L. R., 10 Calc. 860.

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and not for the plaintiffs or the judgment-creditors whose interest they purchased, we are bound to decide that art. 120 of the second schedule of the Limitation Act of 1877 is the article which applies to this case and that the suit is consequently within time. The other issues have been found in the Court below in favor of the plaintiffs. Those findings have not been objected to by objections filed under the Code of Civil Procedure. We must consequently accept them, as we do. We accordingly decree the appeal with costs and pass a decree for the amount claimed by the plaintiffs, namely, Rs. 9,635-4-9 with 6 *per cent.* interest from the date of our decree and costs of both the Courts.

Appeal decreed.

Before Mr. Justice Straight and Mr. Justice Knox.

1891
May 27.

BALDEO SAHAI (DEFENDANT) *v.* BAIJ NATH (PLAINTIFF). *

Act IV of 1882 (*Transfer of Property Act*) *s.s.* 52 *and* 82—*Contribution—Lis pendens.*

Two properties, A and B, belonging to different owners, were mortgaged under a joint bond for the same debt. The mortgagee put his bond in suit, and having obtained a decree caused property A to be sold, the proceeds of which proved more than sufficient to satisfy the whole mortgage debt. Before such sale, however, X had, in execution of a simple money-decree, acquired a share in property A. X accordingly sued for contribution from property B, in that, so far as his share in property A went, he had satisfied the mortgage debt, and ultimately obtained a decree in his favor; but, during the pendency of that litigation, property B had been transferred to Y.

Held that Y must take the property subject to X's right to contribution from it in respect of the loss of his share in property A.

The facts of this case sufficiently appear from the judgment of Straight, J.

Mr. T. *Conlan* and Mr. *Amir-ud-din*, for the appellant.

Babu *Jogindro Nath Chaudhri*, for the respondent.

STRAIGHT, J.—It is unfortunate that the facts and dates relating to the circumstance out of which this litigation has arisen were

*Second Appeal No. 1562 of 1888 from a decree of Maulvi Muhammad Abdul Quaium, Subordinate Judge of Bareilly, dated the 27th March 1888, confirming a decree of Babu Ganga Prasad, Munsif, Bareilly, dated the 16th December 1887.

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not more distinctly and specifically stated by the lower appellate Court in a more concise form. To put it shortly, the matter stands thus. In the year 1873, Ramji Mal and Nath Mal Das executed a simple mortgage for Rs. 625 in favor of one Bansi Dhar. As security for the loan, Ramji Mal mortgaged his 1 biswa 14 biswansis of Namdarganj, and Nath Mal Das his 1 biswa 5 biswansis of Siruli. In April 1877, the mortgagee, Bansi Dhar, put his bond in suit, and, having obtained a decree, caused Ramji Mal's 1 biswa 14 biswansis of Namdarganj to be brought to sale, and it was sold for Rs. 1,525, which was more than sufficient to satisfy and discharge the mortgage-debt. Bansi Dhar, therefore, disappears from the transaction and need not be further mentioned.

Prior to this sale the present plaintiff, Baij Nath, on the 23rd October 1876, in execution of a simple money-decree against Ramji Mal had acquired 17 biswansis 1 kachwansi out of the 1 biswa 14 biswansis of Ramji Mal's in Namdarganj. When, in execution of that decree upon the mortgage, the whole of Ramji Mal's interest in Namdarganj was sold, the plaintiff was deprived to the extent of the interest which he had acquired therein; namely, 17 biswansis 1 kachwansi. In other words, he, to the extent that that interest represented in the sale, satisfied and discharged the mortgage-debt. He therefore, in my opinion, became entitled to the equities provided for in s. 82 of the Transfer of Property Act, and, as standing in the shoes of Ramji Mal, he was entitled to call for contribution from Siruli in proportion to what Siruli should have paid to the mortgage-debt.

A suit was instituted by the plaintiff, therefore, against Ramji Mal and Nath Mal Das, Ramji Mal apparently being added more as a matter of form. By that suit the plaintiff in explicit terms claimed from the immovable property of Siruli its fair contribution to the mortgage-debt, which to the extent of his 17 biswansis 1 kachwansi in Namdarganj, he had had to pay. That suit went through three Courts, ending in the decree of this Court, by which it was found that the plaintiff was entitled to a contribution from Siruli of Rs. 401-5-2.

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In my opinion that was not a mere money-suit. That was a suit which by operation of law affected the immovable property of Siruli and was directed towards obtaining from that property, Siruli, what by law it was bound to contribute under s. 82 of the Transfer of Property of Act. Now it is not denied that, pending that suit, and obviously for the purpose of defeating the just claim of the plaintiff, Siruli was transferred by Nath Mal Das to the present defendant, Baldeo Sahai. In my opinion this was a transfer *pendente lite* which would come within s. 52 of the Transfer of Property Act, and any such transfer so made would convey to the transferee that property with all the imperfections upon its head that it would be subject to under the suit that was then pending. Consequently the defendant, Baldeo Sahai, took the property in and under circumstances that constrain him to hold that property subject to the decree that was passed in that suit. The aim and object of the principle of *lis pendens* is to avoid multiplicity of litigation, and if some such doctrine were not to hold good, the party to a litigation in which immovable property was concerned might part with that property to a dozen different transferees, with the result that a dozen different suits would have to be brought for setting aside those transfers. For the reasons I have given I hold that the decree of the lower appellate Court is right, and that this appeal should be and it is dismissed with costs.

KNOX, J.—I concur.

Appeal dismissed.

Before Mr. Justice Straight and Mr. Justice Knox.

JASODA NAND AND ANOTHER (DEFENDANTS) v. KANDHAIYA LAL (PLAINTIFF) *

1891
May 28

Pre-emption—Wajib-ul-arz, construction of—Muhammadan Law.

In a suit for pre-emption based on a *wajib-ul-arz* the material words of the *wajib-ul-arz* under the heading of "Custom for pre-emption" were as follows:—"At the time a proprietary share is transfered a right of purchase will vest, first, in a

* Second Appeal No. 1594 of 1888 from a decree of J. Deas, Esq., District Judge of Jaunpur, dated the 30th July 1889, reversing a decree of Maulvi Muhammad Said Khan, Subordinate Judge of Jaunpur, dated the 19th March 1888.

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co-sharer of the same family, and then in the other co-sharers of the village in preference to a stranger, provided that the same price is paid by the co-sharer as is offered by the stranger"

Held that these words were intended to define a special custom of pre emption, and did not merely mean that the custom of pre-emption according to the Muhammadan law was to the followed.

Ram Prasad v. *Abdul Karim* (1) distinguished.

The facts of this case sufficiently appear from the judgment of the Court.

Mr. *D. Banerji*, for the appellants.

Pandit *Sundar Lal*, for the respondent.

STRAIGHT, J. (KNOX, J., concurring).—This was a suit for pre-emption and the vendee is the appellant. The plaintiff is an admitted co-sharer within the terms of the *wajib-ul-arz* and the defendant is a stranger. The terms of the *wajib-ul-arz* are as follows, under the head of "custom for pre-emption":—"At the time a proprietary share is transferred a right of purchase will vest, first, in a co-sharer of the same family, that is, of the vendor, and then in the other co-sharers of the village, in preference to a stranger, provided that the same price is paid by the co-sharer as is offered by the stranger."

The Court below has decreed the claim, and it is contended by Mr. *Banerji* on behalf of the vendee-appellant that this passage in the *wajib-ul-arz* merely defines the parties entitled to enjoy the custom of pre emption and that it does not specify or define the custom, which must be looked for in the Muhammadan law, which law, in the absence of contract or custom to the contrary, supplies the custom. In support of this view, he called our attention to the case of *Ram Prasad* v. *Abdul Karim* (1) which was a considered judgment of the learned Chief Justice and my brother Mahmood. It seems to me that that case is clearly distinguishable and that the language used there in the *wajib-ul-arz* is wholly different from that used here. There the words of the *wajib-ul-arz*

(1) I. L. R., 9 All. 513.

were—"the custom of pre-emption prevails according to the usage of the country," and, as I understand the learned Chief Justice, there was no evidence in that cause beyond the declaration contained in the *wajib-ul-arz* of what the nature of the custom was, and the learned Chief Justice therein said, what I entirely agree in, namely, that where such general terms are used, the custom that must be looked for is that custom which mostly prevails, *viz.*, the custom as recognised by the Muhammadan law. But in the present case it appears to me that the *wajib-ul-arz* itself defines and declares what the custom is, and that within the four corners of the paragraph to which I have called attention the mode in which that custom is to be exercised and regulated is specifically fixed, in other words; that the right of pre-emption vests primarily in the co-sharer *ek jaddi*, and secondly in the co-sharer of the village, and that as to both of them there is this proviso that they must give the same price for the property sold as a stranger was prepared to give for it. The interpretation that I have placed upon the case of *Ram Prasad* v. *Abdul Karim* (1) is consistent with what the learned Chief Justice himself said in *Husain Khan* v. *Umedi Bibi* (2) and in unison with the remarks of Mahmood, J., in *Muhammad Rustam Ali Khan* v. *Niadar Singh* (3). I therefore think that the claim of the plaintiff was rightly decreed, and he was entitled to pre-empt the property in suit. While dismissing the appeal with costs, we direct, in accordance with the rule laid down in the recent Full Bench of this Court, that the time for the payment of money be extended to the 1st of August 1891, and the decree will declare that if the money is paid in by that date, the plaintiff will get the property, and if the money be not paid by that date, the plaintiff's suit will stand dismissed with costs. To leave no doubt upon the question, I think it well to add that in the event of the money being paid in by the specified date, the plaintiff will have his costs in all the Courts.

Appeal dismissed.

(1) I. L. R 9 All. 513. (2) Weekly Notes, 1889, p 192.
(3) Weekly Notes, 1886, p 114.

1889
December 10.

FULL BENCH.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell and Mr. Justice Mahmood.

KODAI SINGH (PLAINTIFF) *v.* JAISRI SINGH AND OTHERS (DEFENDANTS).

Pre-emption—Decree conditional on payment of price stated within a fixed period, otherwise suit to stand dismissed—Non-payment of pre-emptive price—Appeal after expiration of period fixed by decree.

The plaintiff in a pre-emption suit obtained a decree in his favor for pre emption of the share in suit on payment of a fixed sum within a period specified in the decree, otherwise his suit was to stand dismissed.

Held that such plaintiff could appeal from such decree after the period prescribed therein had elapsed without his paying in the pre-emptive price fixed thereby, both as to the correctness of the pre-emptive price and as to the reasonableness of the time allowed for payment.

THE facts of this case are given in the referring order of Mahmood, J., of the 28th May 1889, which is as follows :—

MAHMOOD, J. This appeal has arisen out of a suit for pre-emption in which the right was sought to be enforced in respect of a sale which took place on the 14th January 1886.

The suit was instituted on the 14th January 1887 and resulted in a decree in favor of the plaintiff passed by the Munsif who presided in the Court of First Instance on the 28th April 1887. By the decree it was found that the real amount of the purchase money was Rs. 799, while the plaintiff had alleged that the real price was only Rs. 700. The time fixed for payment of such money was 15 days from the date of the decree.

From the decree of the Munsif the defendants did not appeal, but the plaintiff appealed only in respect of the sum of Rs. 99, that is to say, the excess over Rs. 700, which the plaintiff had alleged was the right amount of the consideration money. The plaintiff-appellant also complained in the grounds of appeal to the Lower Appellate Court that the time fixed for payment of the consideration money was unreasonably short.

The appeal was presented on the 27th May 1887, and it was decided by the lower Appellate Court on the 2nd February 1888.

In deciding the appeal, however, the learned Judge of the lower Appellate Court has not gone into the merits of the case as to the amount of the purchase money which the plaintiff alleged was in excess of the real purchase money, but dismissed the appeal before him upon the ground that, the term within which the money was to be paid under the decree of the first court having expired, the plaintiff had no right of appeal. This is practically what the learned Judge has held, and there is no finding in the case as to the sum of money, namely, Rs. 99, as to which the appeal had been preferred to him.

In disposing of the case the learned Judge has relied upon a ruling of my own in *Chhidda* v. *Imdad Husain* (1). To the views which I expressed in my judgment in that case I still adhere, but I am of opinion that there is nothing in the judgment to have allowed the learned Judge to obviate the necessity of having to try the case upon the merits.

From the decree of the lower Appellate Court this second appeal has been preferred, and Mr. *Jwala Prasad's* argument in support of the appeal seeks that the case should be remanded for trial upon the merits under s. 562 of the Code of Civil Procedure. The argument is, however, resisted by Mr. *Ram Prasad*, who, I think, is entirely within his rights when he relies upon two Division Bench rulings of this Court, one being *Mulu Singh* v. *Rahim Kuar* (2) in which the learned Chief Justice and my brother Brodhurst concurred, and also upon an unreported ruling of the learned Chief Justice and my brother Tyrrell, in First Appeal No. 25 of 1888, decided on the 8th May 1889. Both of these rulings support the contention of Mr. *Ram Prasad* because at the time when the learned Judge of the lower Appellate Court had to decide the appeal before him, and, indeed, because at the time when the appeal to him had been preferred, the 15 days' period provided by the First Court for payment of the purchase money had expired, there could be no reason for the learned Judge to go into the merits of the case.

(1) Weekly Notes, 1888, p. 1. (2) Weekly Notes, 1888, p. 22.

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Mr. *Jwala Prasad* for the appellant has argued that, though these cases are opposed to his case, he is prepared to argue the point *de novo*, if I should allow him to open the question, which would require my going behind the conclusions and judgments of the two rulings to which Mr. *Ram Prasad* has referred.

I do not think that I should, sitting here as a single Judge, reopen the question in connection with the two Division Bench rulings; but I feel some difficulty in accepting them, and I think the proper course is to refer the case to a Bench consisting of two Judges, with a further recommendation that the case be laid before the learned Chief Justice for orders as to whether or not, in view of the rulings that I have cited, it is a fit case to be considered by the Full Bench.

The case was accordingly laid before the Full Bench, and the following judgments were delivered :—

STRAIGHT, J.—The learned Judge appears to have refused to enter into the question of price because, the Rs. 799 not having been paid within the time directed by the decree of the First Court, he was of opinion that there was no subsisting decree from which an appeal could be preferred. Strictly speaking, the exact decree which stood at the date of the plaintiff's filing his appeal was that of dismissal of his suit by reason of his having failed to deposit the Rs. 799 within 15 days, and had he appealed it on that footing he might have raised questions as to the propriety of the First Court's finding on the matter of price and the time allowed him within which to pay the amount into Court. I think, therefore, in this case it must be taken that there was a decree from which an appeal could be entertained, and that the plaintiff was entitled to get a determination of the question of price, which when decided might properly guide the Judge's conclusions upon the further point as to whether the time allowed by the First Court was reasonable.

We in no way wish to depart from what was thrown out in the Full Bench ruling of this Court reported in the N.-W. P. Reports for 1868, p. 54, and followed by Pearson and Spankie, J. J., in I. L. R.

2 All., p. 744, that an Appellate Court in its discretion may vary the decree of a first Court in the matter of time for payment, even though such time expired before the appeal was filed.

The effect of this view upon the present appeal is that it will be decreed and the appeal be remanded to the Court of the Judge of Gorakhpur for restoration to his file of pending appeals and disposal in ordinary course as an appeal upon the pleas, including that of time, taken by the plaintiff-appellant Costs hitherto incurred will follow the result.

MAHMOOD, J.—This case has arisen out of a reference made by me, and the circumstances which gave rise to the reference are stated in my order of reference, dated the 28th May 1889, and I do not wish to repeat the circumstances of the case further than saying that my judgment in this case depends on, and refers to, that order and the facts stated therein for the consideration of the question of law which arises here. This being so, it is, I think, important for me specially, as the referring Judge in the case, to explain that my ruling in *Chhidda* v. *Imdad Husain* (1) is not inconsistent with the view expressed in the judgment which has just been delivered. That was not a case of a regular pre-emption decree which was the subject of appeal, but the appeal related to the execution of such a decree which fixed one month as the time for payment of price. That decree had become final by being affirmed by the appellate Court on the 15th January 1885, without any alteration as to the term of one month; but the deposit of the purchase money was not made till the 16th February 1885, that is, after the fixed period of one month, even as calculated from the appellate decree of the 15th January 1885. The Appellate Court in that case in passing its decree of the 15th January 1885 had, no doubt, power to decline to extend the period, as was held by the Full Bench in *Sheo Pershad Lal* v. *Thakoor Rai* (2), to which I referred, and, as a Court executing a decree, declined either to hold that the decree in fixing a period for payment of price was illegal or that the period of one month which it prescribed could be extended by the Court execut-

(1) Weekly Notes, 1888, p. 4. (2) N.-W. P. H. C. Rep., 1868, p 254.

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ing the decree. The argument that the period of one month should be calculated from the final appellate decree of the 15th January 1885 could not very well be pressed in that case (as indeed it was not pressed) in favor of the pre-emptor, decree-holder, because, as I have already said, even upon that calculation his deposit of the price on the 16th February 1885 was beyond time. The case is therefore distinguishable from the present case. The real difficulty in connection with pre-emption decrees, and specially with reference to the point which has given rise to this reference, arises in considering whether such decrees, which are usually passed, or which purport to be passed, under s. 214 of the Code of Civil Procedure, are decrees in the nature of decrees *nisi* or decrees absolute in the same manner as in any other class of cases where the decrees may, by force of equity, be subjected to considerations and limitations of amount or time as to payment of money as a condition precedent to the recovery of possession, or subjected to other restrictions which the Court may deem fit to impose. This is a matter which I had to bear in mind in *Rup Chand* v. *Shamsh-ul-Jehan* (1), and I dealt with the matter in a suit for pre-emption itself, dealing with it much upon the same principles as those governing other conditional decrees passed in suits where the possession of immovable property is subjected to conditions. I think it is enough to say, in order not to delay or prolong my judgment, that, as I have already explained, between my ruling in *Chhidda* v. *Imdad Husain* (2), and the ruling in *Rup Chand* v. *Shamsh-ul-Jehan* (1) no distinction of principle really exists, and it is only because the learned Judge of the lower Appellate Court misapplied the former ruling that he considered that the ruling relieved him of the duty of trying the suit upon the merits. I think the rule which was laid down in *Rup Chand* v. *Shamsh-ul-Jehan* (1) is a rule which should govern this case, consistent as it is with the principle of the Calcutta Court in *Noor Ali Chaudhuri* v. *Koni Meah* (3) and the Bombay Court ruling in *Daulat* and *Jagjivan* v. *Bhukandas Manekchand* (4), to both of which I referred in the case. I am also glad that the con-

(1) I. L. R. 11 All 346.
(2) Weekly Notes 1888 p. 4.
(3) I. L. R. 13 Calc. 13.
(4) I. L. R. 11 Bom. 172.

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clusions arrived at by me in this case are wholly consistent with those arrived at in the judgment which has just been delivered. I therefore agree in the order which has been made in the case by my brother Straight.

EDGE, C. J.—In concurring with the judgment which has been delivered by my brother Straight, I should say that I understand that judgment to be in no way based upon any cases referred to in the judgment just delivered by my brother Mahmood. As to those cases and the inferences to be drawn from them I decline to express any opinion. I am of the same opinion as my brother Straight.

BRODHURST J.—I concur with my brother Straight.

TYRRELL, J.—I also concur with my brother Straight without expressing any opinion on the cases just referred to in his judgment by my brother Mahmood.

APPELLATE CIVIL.

1891
April 22.

Before Mr Justice Mahmood.

BANSIDHAR AND ANOTHER (JUDGMENT-DEBTORS) *v* SITA RAM (DECREE-HOLDER).*

Second Appeal—Plea sought to be raised which was not taken in the memorandum of appeal—Civil Procedure Code, s 542.

Section 542 of the Code of Civil Procedure was intended to confer upon the Court a power exerciseable by it alone; it was not intended to enable an appellant to take the respondent by surprise by urging matter of which he had no notice.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Maulvi *Ghulam Mujtaba*, for the appellants.

Babu *Jogindro Nath Chaudhri*, for the respondent.

MAHMOOD, J.—This is a second appeal, and was admitted by my late Honorable colleague Mr. Justice Brodhurst by his order, dated the 10th January 1890.

* Second appeal No 36 of 1890 from a decree of A Sells, Esq, District Judge of Meerut, dated the 26th November 1889, reversing a decree of Maulvi Ahmad Ali, Munsif of Bulandshahr, dated the 6th April 1889.

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The appeal is of the nature covered by the jurisdiction of the single Judges of this Court under rule 1 of the rules of the Court, and it is now before me for disposal.

The appellant is represented by Mr. *Ghulam Mujtaba*, holding the brief of Mr. *Madho Prasad*, and the respondent is represented by Mr. *Jogindro Nath Chaudhri*.

Upon the case being called for hearing, Mr. *Ghulam Mujtaba* has frankly admitted that both the grounds taken in the memorandum of appeal are unsustainable, but the learned pleader has asked me to consider matters other than those contained in the grounds of appeal. In making this prayer the learned pleader has relied upon s. 542 of the Code of Civil Procedure and the cases noted in the margin.

(1) *Mahabir Tiwari* v *Jhangur*
(2) *Dharam Das* v *Nand Lal Singh.*

On the strength of these authorities the learned pleader has set forth in his argument matters wholly foreign to the circumstances mentioned in the memorandum of appeal, and has contended that I am bound to decide the appeal upon some grounds other than those mentioned in the memorandum of appeal.

To this Mr. *Jogindro Nath Chaudhri* objects, on the ground that no sufficient cause has been shown why the appellant should be heard on matters foreign to the grounds of appeal, and of which the respondent had no notice.

I am of opinion that Mr. *Jogindro Nath's* objection is right. Parties complaining of judgments and decrees must mention all the grounds of complaint in the memorandum of appeal, and the provisions of s. 542 of the Code of Civil Procedure are not meant to relieve them of such necessity.

The Legislature, as I understand s. 542 of the Code of Civil Procedure, meant to confer upon Courts the power to decide appeals upon grounds other than those set forth by the appellant in the memorandum of appeal, and that power is to be exercised by

(1) Weekly notes 1887, p. 213. (2) Weekly notes 1889, p. 78.

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the Court alone, and not to enable the appellant to take the respondent by surprise by urging matters of which he had no notice. Neither of the two rulings cited conflicts with this view.

The only two grounds taken in the memorandum of appeal having been abandoned, I have no alternative but to dismiss the appeal, and I do so with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Knox.

1891
April 28.

KISHUN LAL (PLAINTIFF) *v* MUHAMMAD SAFDAR ALI KHAN AND OTHERS (DEFENDANTS).*

Execution of decree—Sale in execution—Sale set aside—Suit by purchaser for return of purchase money—Civil Procedure Code, ss. 295, 315.

Where an auction purchaser seeks to have refunded the price paid by him for property sold in execution of a decree, on the ground that at the time of sale the judgment-debtor had no saleable interest therein, it is competent to him to proceed by way of a regular suit against the person into whose hands such price has come as such person's rateable share of the assets of the judgment-debtor under s. 295 of the Code of Civil Procedure. He is not limited to the procedure in the execution department mentioned in s. 315 of the said Code.

Munna Singh v. *Gajadhar Singh* (1) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the appellant.

Mr. *W. M. Colvin*, for the respondents.

EDGE, C. J., and KNOX, J.—This was a suit brought to recover purchase money which was paid by the plaintiff, and which had been distributed after payment amongst certain creditors of the firm of Lachmi Narain. The defendant No. 1 was one of those creditors. Lachmi Narain's firm failed. There was a large number of decrees obtained by creditors under which property of the firm was from time to time brought to sale and assets realized. On the 20th November 1885, a property of Lachmi Narain's firm was sold in

* First Appeal No. 157 of 1889 from a decree of Maulvi Muhammad Abdul Qayum, Subordinate Judge of Bareilly, dated the 21st June 1889.

(1) I. L. R., 5 All., 577.

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execution of a decree. On the 5th May 1886, that sale was set aside on the objection of the judgment-debtor. On the 20th September 1886, the purchasers at that sale filed their suit to have it declared that the sale was good. On the 7th March 1887, the Subordinate Judge, in whose Court that suit was, dismissed it. The purchasers appealed to this Court, and, on the 14th May 1888, this Court decreed the relief prayed for, holding that, as the defendants there had filed a confession of judgment, the plaintiffs, purchasers, were entitled to a decree. On the 10th September 1888, those purchasers obtained possession. Now we come to the connection of the plaintiff here with the property. On the 20th September 1886, the same property was sold in execution of another decree which had been obtained against the firm of Lachmi Narain and was purchased by the plaintiff for Rs. 21,125, which included the charges in connection with the sale. On the 4th December 1886 the sale of the 20th September 1886 was confirmed. On the 20th September 1886 the plaintiff paid in one-fourth of the purchase-money. The sum paid on that day, Rs. 5,235, was paid into the treasury of Bareilly to the account of the Subordinate Judge of that place under the head of Civil Court's deposit. Money is not received in the treasury without the authority of the proper officer given for the payment of the money. On the 11th October 1886 the balance of the purchase-money was paid, and of that the sum of Rs. 15,843 was similarly paid into the treasury to the account of the Subordinate Judge. The authority for payment of the money out of those sums indicated the transactions out of which those payments arose. Those indications are merely indications for the purposes of the Subordinate Judge's Court. The defendant No. 1 here was entitled to a rateable proportion of the assets which were realized after the 7th July 1886. That is, in the case of each realization he became, under s. 295 of the Code of Civil Procedure, entitled to his rateable share. The total amount of the money due to him was Rs. 36,166. The total amount of his rateable shares came to Rs. 10,569-3-0, and this sum of Rs. 10,569-3-0, which represented his rateable shares in some 12 realizations, was paid to him out of the treasury on the orders of the Subordinate

Judge's Court. The money was paid out in two sums; one of Rs. 5,334-3-0 under voucher numbered 331, the other of Rs. 5,235 under voucher numbered 326. The last voucher carrying back a reference by numbers shows that in the book of the Court the sum of Rs. 5,235, which had been paid in on the 20th September 1886, was accounted for. As a matter of fact, that Rs. 5,235 did not represent the defendant's rateable share on the money which was realized by the sale to the plaintiff, but represented his share on that money plus, in part, his shares on the other realizations. The plaintiff here has sued the defendant to recover that sum of Rs. 5,235 and interest, on the ground that, owing to the decree of this Court having made valid the previous sale, there was no saleable interest of the judgment-debtors in the property which he bought. In the 8th paragraph of the plaint it is alleged that the judgment-debtor had no saleable interest in the village Saidpur, and that the plaintiff got nothing as consideration for the money paid by him. The written statement did not traverse that allegation, but raised certain defences, such as that the sale to the plaintiff was still subsisting. We must, consequently, on the pleadings, take it to be admitted that at the time of the sale of the 20th September 1886, there was no saleable interest of the judgment-debtors in the property. We must deal with this case on the basis that the judgment-debtors had, within the meaning of s. 315 of the Code of Civil Procedure, no saleable interest at the time of sale to the plaintiff.

It is contended, amongst other things, that the plaintiff's remedy, if any, was to obtain repayment of the purchase money under s. 315 of the Code through the court which had executed the decree. There is, in our opinion, a good deal to be said in support of that contention, but we are bound by the decision of the Full Bench of this Court *in re Munna Singh* v. *Gajadhar Singh* (1), in which it was distinctly held that in such a suit as this the purchaser can sue the decree-holder for recovery of the purchase money, and that he is not limited to the procedure in the execution department mentioned in

(1) I. L. R. 5 All., 577.

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KISHUN LAL v. MUHAMMAD SAFDAR ALI KHAN.

s. 315. We were referred to the case of *Kunhi Moidin* v. *Tarayil Moidin* (1), in which the procedure was that the person who sought repayment of money proved in a suit that the judgment-debtor had no saleable interest, and, under s. 315, went to the proper Court to obtain redress of payment. The Subordinate Judge tried this case and dismissed the plaintiff's claim.

In our opinion, according to the Full Bench ruling to which we have above referred, we must give the plaintiff a decree for the rateable share received by the defendant of the Rs. 21,000, speaking roughly, that the plaintiff paid in respect of the purchase. We cannot give the plaintiff the full amount of Rs. 5,235, because, with exception of Rs. 1,016, the defendant received nothing out of the moneys paid by the plaintiff in respect of the purchase of the 20th September 1886. The Rs. 1,016 is accepted as representing the rateable share of the plaintiff's money which the defendant No. 1 received.

We reverse the decree below and give the plaintiff a decree for Rs. 1,016 with proportionate costs, dismissing his claim as to the balance with proportionate costs. We do not allow interest, as we think there was no real foundation for making a claim for the whole of the money.

Appeal decreed.

1891
April 20.

Before Mr. Justice Straight and Mr. Justice Tyrrell.

MAHABIR PRASAD MISR AND OTHERS (PLAINTIFFS) *v.* MAHADEO DAT MISR AND OTHERS (DEFENDANTS).*

Act X of 1873 (*Oaths Act*) *ss.* 10 *and* 11—*Referee's depositions inadequate for decision of question referred—Appeal after death of referee—Practice.*

Where a cause had been decided under the provisions of ss 10 and 11 of the Oaths Act (Act X of 1873) with reference to the depositions of a person appointed by agreement of the parties as referee, and where, after the death of the referee, on an appeal being preferred against the decree so based upon those depositions, it was found that the said depositions did not fully cover the questions in issue between the parties.

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* First Appeal No 146 of 1889, from a decree of Maulvi Ahmad Hasan, Officiating Subordinate Judge of Gorakhpur, dated the 16th May 1889.

(1) I. L. R. 8 Mad, 101.

1891

MAHABIR PRASAD MISR v. DAT MISR.

Held, that the case should be remanded to the lower Court for disposal according to the usual procedure.

THE facts of this case sufficiently appear from the judgment of of the Court.

Mr. *T. Conlan* and Mr. *W. M. Colvin*, for the appellants.

The Hon'ble Mr. *Spankie* and Munshi *Jwala Prasad*, for the respondents.

STRAIGHT, J. (TYRRELL, J. concurring).—This is a somewhat peculiar case. It will be convenient to state a few facts by way of preliminary to the order I am about to make in this case. The suit was brought by the plaintiffs, appellants, against the defendants upon the ground that their fathers and the ancestor of the defendant Mahadeo Dat Misr had been members of a joint and undivided Hindu family in possession of joint and undivided immovable property; that in 1881, in consequence of some misunderstanding, separation of food and residence had taken place; that subsequently the defendants had by their improper action deprived the plaintiffs of their share in the joint enjoyment of the joint family property; and they sought to have that joint possession and enjoyment restored to them as before.

It is not necessary to discuss the statements contained in the written statement of the defendants; it is enough to remark that, on the 27th March 1889, a petition was filed by the plaintiffs and the defendants in the Court of the Subordinate Judge of Gorakhpur, stating that they had mutually agreed to be bound by the deposition of Mahárája Udai Narain Mal, the owner of the *ráj* of Manjholi in the manner contemplated by ss. 10 and 11 of the Oaths Act. A commission was issued for the examination of the Mahárája, and on two occasions, that is, on the 8th April 1889, and on the 29th April 1889, questions were put to him to which replies were given. Upon the strength of those depositions the Subordinate Judge of Gorakhpur passed a decree in favor of the defendants, holding that the answers given by the Rája precluded the claim of the plaintiffs and established the separate proprietary title of the defendants to the property in respect of which the suit had been brought for declara-

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MAHABIR PRASAD MISR v. MAHADEO DAT MISR.

tion of the plaintiffs' joint interest therein. It is against this decree that this first appeal has been preferred, and the contention on the part of the appellants, *firstly*, was that a proper construction of the Rája's deposition showed that the plaintiffs had succeeded in establishing their joint title to the property in dispute. Mr. *Colvin*, who argued the case on behalf of the appellants, contended that the answers contained in these depositions were so hazy and ambiguous that they were wholly insufficient to justify the decision of the Court below. Mr. *Spankie* for the respondents strenuously urged that, at least as to some of the points, the statements of the Rája were specific enough, and that, according to the last answer given by him in his second deposition, it was clear that the defendants did acquire and were in sole proprietary possession of the property in suit. I cannot agree with this latter contention. Both my brother Tyrrell and myself have perused more than once the two depositions of the Rája, and we think that they do not convey to our minds any clear or precise expression or statement as to the nature of the rights of the several parties in the property in suit. It is at least abundantly clear that at the time the property in dispute came into possession of the parties, either by gift or purchase, they were members of a joint and undivided Hindu family. That being so, the presumption would be that the property so acquired would be the property of that joint and undivided Hindu family until the contrary was proved. Before passing such a decree as has been made in the present case, upon the strength of the statements of the Rája, it was essential that his statements should have been very clear and definite in respect of the specific title acquired by the respective parties as to the several properties in dispute. These depositions do not convey to our minds any such impression, and although I should always be strongly disinclined to assist a party to an agreement under the Oaths Act in getting out of it, yet I am bound to see that the object of the parties when they entered into it has been satisfactorily accomplished by the deposition of the referee, and, if that object has not been accomplished, then that a further deposition should be obtained, or, if that is imposible, as is the case here, owing to the Rája's death, that the question should be tried in the ordinary way by the Court.

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MAHADIR PRASAD MISR v. MAHADEO DAT MISR.

We decree the appeal, reverse the decree of the Court below and remand the case to the Court of the Subordinate Judge of Gorakhpur for restoration to the file of pending cases and disposal according to law. Costs of the appeal and costs incurred in the Court below will follow the result of the suit.

Appeal decreed.

1891
May 8.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Mahmood.

GOBIND NATH TIWARI (PLAINTIFF) *v.* GAJRAJ MATI TAURAYAN AND OTHERS (DEFENDANTS).*

Suit for declaratory decree—Declaration sought that certain property was joint ancestral property and not liable to attachment in execution of a certain decree—Court-fee payable on such suit.

The plaintiffs specified in their plaint as the reliefs sought by them :—" (1). That it be declared by the Court that the property mentioned at foot is the joint ancestral property of the plaintiffs and not liable to attachment and sale in execution of the decree of the defendant No. 4, dated 4th December 1883, against the defendant No. 1. (2) That the costs of the suit be also awarded by the decree. The suit is valued with reference to the amount of the decree and the value of the property at Rs. 6,000. (3). That any other relief which the Court may think the plaintiffs entitled to may also be granted."

Held, that the suit should be deemed a suit for one declaratory decree only, without consequential relief, and that a court-fee of Rs. 10 was sufficient.

THE plaintiffs brought their suit in the Court of the Subordinate Judge of Gorakhpur for a declaration that certain property was joint ancestral property and not liable to attachment under a decree to which certain of the defendants were parties. They paid on their plaint a court-fee of Rs. 10. The Subordinate Judge dismissed the plaintiffs' claim without going into the merits, on the ground that it was unmaintainable having regard to the provisions of s. 42 of Act I of 1877 (Specific Relief Act). One of the plaintiffs then appealed to the High Court paying, as in the Court of first instance, a court-fee of Rs. 10. A preliminary objection was taken by the respondents that the court-fee in both Courts was insufficient, and, that being so, the appeal should be dismissed. Before deciding this objection,

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* First appeal No. 138 of 1889 from a decree of Maulvi Ahmad Hasan, Subordinate Judge of Gorakhpur, dated the 25th June 1889.

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however, the Court (Mahmood and Young, J.J.) called for a report from the Taxing Officer of the Court as to the sufficiency of the Stamp. That officer's report was as follows :—

REPORT.

"In F. A. No. 138 of 1889, the suit was dismissed and the plaintiff is the appellant in this Court.

The relief he claims, as shown by the plaint, is "that the property is the joint ancestral property of the plaintiff and not liable to attachment, &c." under a certain decree.

He certainly does not seek consequential relief, and his case differs from that of the appellant in F. A. No. 199 of 1887, as in that case the lower Court had granted consequential relief, or, at least, what used until more recent rulings to be considered consequential relief.

The only question then is whether he seeks more than one declation or not.

Certainly the words of the plaint look as if two separate declarations were asked for :—(1), that the property is the plaintiff's, and (2), that it is not liable to attachment under a certain decree.

If the second part does not follow necessarily out of the first proposition I think that two declarations are asked for and that each should bear a Rs. 10 stamp, for cases are quite conceivable in which a declaration that the property belongs to the plaintiff might not connote the proposition that it was not liable to attachment in a certain case.

If, however, the latter proposition necessarily follows the former and a declaration that the property is the plaintiff's involves its freedom from liability to attachment under the decree, I think the fact of the Court Fees Act being of a fiscal nature and one to be construed strictly, and as far as possible in favor of the litigant, should be considered, and the two propositions deemed but one expressed in different manners, and that a Rs. 10 stamp would be sufficient."

The case then came with this report before Edge, C. J., and Mahmood, J., who made the following order :—

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GOBIND NATH TIWARI v. GAJRAJ MATI TAURAYAN.

Pandit *Sundar Lal*, for the appellant.

Mr. *T. Conlan* and Munshi *Kashi Prasad*, for the respondents.

EDGE, C. J. and MAHMOOD, J.—On the report of the Taxing Officer of this Court the stamp is sufficient. The Court below must try the suit on the merits and decide on the evidence and the law as applicable to it whether or not the plaintiffs are entitled to the declaration they seek. We set aside the decree under appeal, and remand the case under s. 562 of the Code of Civil Procedure to be disposed of according to law. The costs here and hitherto will follow the result.

Cause remanded.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Tyrrell.

1891
May 14.

KALI DAS (DEFENDANT) *v.* BIJAI SHANKAR AND ANOTHER (PLAINTIFFS).*

Hindu Law—Adoption by widow to deceased husband.—Deed of adoption, construction of—Powers of adoptive mother.

The widow of a separated Hindu made an adoption to her deceased husband under a power to adopt conferred upon her by her husband's will. The deed by which the adoption, the validity of which was not disputed, was evidenced, contained, amongst others, the following conditions:—"that during my (*i.e.*, the adoptive mother's) life time I shall be the owner and manager of the estate and that after my death the adopted son should have the same rights and privileges as would have been enjoyed by the natural son of Ishan Chandar Mukarji born of me."

Held that these words conferred upon the widow an interest and an authority not less than she would have had as the widow of a separated sonless Hindu to whom no adoption had been made, so far as her position as manager was concerned.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri*, for the appellant,

Mr. *T. Conlan* and Pandit *Sundar Lal*, for the respondents.

EDGE, C. J., and TYRRELL, J.—This appeal has been brought by one of the defendants in a suit which was for recovery of money due under notes of hand given by one Musammat Sri Matia Matangini Debia. She was the widow of one Babu Ishan Chandar

* First appeal No. 28 of 1890 from a decree of Pandit Indar Narain, Subordinate Judge of Aligarh, dated the 8th November 1889.

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Mukarji, and after his death she executed, on the 24th February 1878, a deed of adoption which, so far as is material, was as follows :—

"I, Sri Matia Matangini Debia, widow and heir of Babu Ishan Chandar Mukarji, son of Babu Tarni Charan Mukarji, raís of the city of Koel, do hereby declare that my husband, Babu Ishan Chandar, on account of his being childless, had a desire to adopt some one for the perpetuation of his name and performance of religious ceremonies, and accordingly had it distinctly recorded in the *wajib-ul-arz* of each of his zamíndári villages, that he, and after his death his wife, had authority to adopt (a son); that he had selected to adopt Kali Das, son of his own brother Santi Chandar; that the time for performing the ceremonies of adoption had not yet arrived, when he fell ill, and then he executed a will in the Bengali character under his own signature authorising me to adopt, and made it over to me; that in execution of the will of my husband I have also selected the same lad as was chosen by my husband, and have accordingly adopted to-day the abovenamed lad in the presence of the members of the brotherhood, after performing all the ceremonies of adoption according to the custom of the caste, and that for its stability I execute this deed of adoption containing the following conditions :—

"That during my life time I shall be the owner and manager of the estate, and that after my death the adopted son should have the same rights and privileges as would have been enjoyed by the natural son of Ishan Chandar Mukarji, born of me. I have therefore executed this deed of adoption that it may serve as evidence and be used when needed. Dated 24th February 1878, corresponding with Phagun Badi (Ashtimi) Sambat 1934, Sunday."

It was signed by her and her signature was witnessed by the natural father of the defendant-appellant. The defendant-appellant was the boy whom she adopted, and is now, we are informed by his counsel, 26 years old. The lady died in February 1888, whilst this suit was pending. The defendant-appellant on the 29th March 1887, filed his written statement, in which, although he

made several charges against the old lady, he alleged that the capacity of the Musammat was that of a manager of a Hindu family; he said she had no right to transfer any property; he alleges that she has incurred unlawfully debts and done acts to his detriment. The Subordinate Judge decreed the plaintiff's claim against the defendant-appellant. On his behalf it has been contended here that the notes of hand in question were given by her in carrying on an Indigo Factory, and that she had no power to incur any debts beyond those for which she alone could be made personally responsible; in other words, that she was the owner of the property and was not in the position of a Hindu widow of a separated sonless Hindu, but in the position of a person who had an estate, for life, and that when it was provided in the deed of the 24th February 1878 that she should be owner and manager of the estate it was intended that she should be manager of the estate on her own behalf only and should not be in the position of the person who in a Hindu family acts and is known as the manager. Reading that deed in its natural sense, we are of opinion that it conferred upon her an interest and an authority not less than she would have had as the widow of a separated sonless Hindu to whom no adoption had been made so far as her position as manager is concerned. The defendant-appellant, by the third paragraph of his written statement, seems to have been of opinion that her capacity as manager was such a capacity as we think was contemplated by the deed. We have been referred to *Chitko Raghunath Rojadiksh* v. *Janaki* (1) *Ramasami Aiyan* v. *Venkataramaiyan* (2) as showing that in Bombay and Madras such an arrangement as is represented by the deed of the 24th February 1878, would be held valid, particularly as it is admitted that the defendant-appellant ratified that arrangement after he attained his majority. We have also been referred to *Bepin Behari Bundopadhya* v. *Brojonath Mookhopadhya* (3) which shows that the view of their Lordships of the Privy Council in the case above referred to from Madras would

(1) 11. Bom. H. C. Rep., 199. (2) I. L. R. 2 Mad. 91. s. c., L. R. 6, I. A. 196.

(3) I. L. R. 8 Calc. 357.

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be equally applicable to a Bengali, subject to the Hindu law of lower Bengal. It is admitted that the defendant-appellant here is such a Bengali. It appears to us, under the above circumstances that the lady having given those notes of hand for the *bonâ fide* purpose of carrying on the Indigo Factory, which, as a matter of fact, had existed and had been carried on by her deceased husband in her life time, the defendant-appellant is liable for the amount decreed against him in the court below. The appeal is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Mahmood.

1891
May 26.

NOURANG RAI (DECREE-HOLDER) *v.* LATIF CHAUDHRI AND OTHERS (JUDGMENT-DEBTORS).*

Execution of decree—Decree to be executed where there has been an appeal.

Where the appellate Court has modified the decree of the Court below, the decree of the appellate Court supersedes entirely that of the Lower Court, and is the only decree which can be executed. *Shohrat Singh* v *Bridgman* (1); *Gobardhan Das* v. *Gopal Ram* (2) and *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (3) referred to.

The facts of this case sufficiently appear from the judgment of Mahmood, J.

Munshi *Kashi Prasad*, for the appellant.

The respondent was not represented.

MAHMOOD, J.—On the 29th September 1885, the plaintiff-appellant's claim for possession of certain property together with future *mesne* profits was partly decreed by the first Court. From the decree thus made an appeal was presented only by the plaintiff, and on the 16th December 1885, his appeal was decreed and so much of the decree of the first Court as had been passed against him was modified.

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*Second Appeal No. 244 of 1890 from a decree of W. R. Burkitt, Esq., District Judge of Gorakhpur, dated the 5th December 1889, reversing a decree of Pandit Alopi Prasad, Munsif of Basti, dated the 3rd August 1889.

(1) I. L. R. 4 All., 376. (2) I. L. R. 7 All., 366.
(3) I. L. R. 11 All, 267.

Under an application for execution made on the 22nd May 1886, possession of the property was delivered to the decree-holder, appellant, on the 8th July 1886, and he was also awarded his costs.

The second application for execution was made on the 15th December 1887, and it was struck off on the 24th November 1888.

The third application for execution, which was made on the 3rd January 1889, was struck off on the 14th August 1889, in default.

The present litigation began with an application for execution made on the 23rd August 1889, which application relates solely to the question of future *mesne* profits, and upon the application being made the judgment-debtors objected, but their objections were disallowed by the first Court; but, upon appeal, the learned judge of the lower appellate Court, reversing the order of the first Court, allowed the objections of the judgment-debtors upon grounds which can best be expressed in his own words :—

"The decree to be executed is the decree of the appellate Court and that decree, varying the decree of the Court of first instance, makes no provision for future *mesne* profits, such profits therefore cannot be claimed in execution."

Now in deciding this second appeal it is necessary to consider the effect of the Full Bench ruling in *Shohrat Singh* v. *Bridgman*(1) as interpreted by the recent Full Bench ruling in *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan* (2). It is also necessary to bear in mind the ruling in *Gobardhan Das* v. *Gopal Ram*(3).

I am of opinion that the effect of these rulings is that the only decree which can be put into execution is the appellate decree of the 16th December 1885, and that, inasmuch as it was not a simple decree of affirmance, but a decree modifying the terms of the first Court, therefore, unless in the decree of the 16th December 1885, there was an order as to future *mesne* profits, no future *mesne* profits could be made the subject of execution. But the decree of the 16th December 1885, was not a decree of simple

(1) I. L. R., 4 All., 376. (2) I. L. R., 11 All., 267.
(3) I. L. R., 7 All., 366.

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affirmance, but a decree modifying the original decree of the 29th September 1885, and this circumstance in my opinion distinguishes this case from the cases above referred to. After having fully heard the arguments, I am of opinion that the learned Judge has arrived at a correct conclusion, and I dismiss the appeal, but without any order as to costs, as the respondent is not represented.

Appeal dismissed.

1891
May 26.

Before Mr. Justice Straight and Mr. Justice Knox.

GAYA SINGH AND OTHERS (DEFENDANTS) *v.* UDIT SINGH (PLAINTIFF) *

Ex-proprietary tenant—Relinquishment of ex-proprietary rights—Act XII of 1881 (*North-Western Provinces Rent Act*) *s s.* 9, 31.

Though an ex proprietary tenant cannot transfer his rights as such for a consideration, there is nothing to prevent his voluntarily relinquishing those rights.

The facts of this case are fully stated in the judgment of Straight, J.

Mr. *Niblett*, for the appellants.

Mr. *Abdul Majid*, for the respondent.

STRAIGHT, J.—It is necessary in order to explain the conclusion at which I have arrived to state in detail the facts of this case. One Gaya Singh and his brother Kunj Behari and his son Baldeo were the owners of a certain *bighadam* zamíndári interest in the Azamgarh district. Appurtenant to that *bighadam* interest was an interest in certain *sír* lands which were cultivated by Gaya Singh, his brother and his son. The present plaintiff-respondent, Udit Singh, brought a suit against Gaya Singh, and in execution of his decree sold the property and purchased it at auction. Subsequently to that purchase Kunj Behari and Baldeo Singh, the brother and son of Gaya Singh, brought a suit to avoid that auction purchase, and made as parties thereto the present plaintiff, Udit Singh and Gaya Singh. That suit was dismissed by the first Court, and thereupon the plaintiffs appealed to the Court of

* Second appeal No. 1508 of 1888 from a decree of E. Galbraith, Esq., District Judge of Azamgarh, dated the 5th June 1888, confirming a decree of Munshi Man Mohan Lal, Sub ordinate Judge of Azamgarh, dated the 30th November 1887.

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the District Judge. While that appeal was pending, the parties entered into a compromise, the effect of which was that the plaintiffs' suit was to be decreed to the extent of ⅔ of the property and dismissed as to the residue In that compromise to which all the parties to the suit were joined, Gaya Singh relinquished his rights in the ⅓ property in favor of the present plaintiff, Udit Singh, and he declared that he would not now or at any future time make any claim to the *sír* land or raise any claim to his ex-proprietary rights. Upon the basis of that compromise a decree was prepared on the 7th April 1885. By that decree ⅔ of the plaintiffs' claim was decreed and the rest of their claim was dismissed. On the 5th July 1887, the plaintiff Udit Singh came into Court with his present suit, and, to put it shortly, he alleged that, subsequently to the decree of the 7th April 1885, having obtained possession of ⅓ of the *sír* appertaining to the ⅓ zamíndári interest of Gaya Singh, namely, on the 26th of July 1885, and having cultivated the same, he was, upon the 6th December 1885 disturbed in the possession of that ⅓, *sír* the crops that he had planted removed, and up to the date of suit he had been kept out of possession, and therefore claimed a decree for joint possession of 6 bighas, 10 biswansis, 13½ dhurs out of 19 bighas, 12 dhurs, representing the ⅓ interest of Gaya Singh, and for damages in shape of profits of which he had been deprived amounting to Rs. 286-15-11. The first Court decreed the plaintiff's claim in part, though it negatived his allegation that he had obtained possession of the *sír*, and also gave him Rs. 103-6-4 as damages. The lower appellate Court, to which an appeal was preferred by the defendants, upheld that decision by the first Court, specifically holding that by the terms of the compromise and decree Gaya Singh had relinquished his ex-proprietary rights. It is contended, now, in second appeal on behalf of the defendants-appellants that what was done at the time of the compromise of 1885 amounted to a transfer by Gaya Singh of his ex-proprietary interest, and that in that case, such transfer, being prohibited by law, could not be recognised, and that, although the defendants had been

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parties to that compromise, they were nevertheless entitled to maintain the plea they have now taken and to set up the illegality of the transaction to which they were parties. No doubt there is authority for that latter contention in the case of *Phalli* v. *Matabadal* (1) and I am not going to depart from what I said on that occasion, nor am I going to hold that the defendants cannot make the defence they have set up. But the question that arises to my mind is whether what was done at the time of the compromise amounted to a transfer of ex-proprietary rights. Now it would not be denied for a moment that if there had been a transfer for a consideration, either in money or in other respects, of that ex-proprietary holding it would have been prohibited by law and could not have been recognised by this Court. But in the Full Bench case of *Gulab Rai* v. *Indar Singh* (2) it was indicated that, although a transfer would be prohibited by law, yet that the question of a simple relinquishment might stand upon a different footing, and it left that point open for determination upon a subsequent occasion.

Now as I understand the Rent Act, and indeed I have expressed myself fully as to the meaning of s. 9 of the Rent Act in the Full Bench case last referred to, the law prohibits an occupancy-tenant not at fixed rate from transferring his holding; but it also provides within the four corners of the Act that he may relinquish his holding in such a way as to relieve himself from liability for the rent of the same, and the one mode in which that is to be done is provided in s. 31 and the following sections of the Act. If then, for the purpose of relieving himself from his liability to rent, a tenant may relinquish his holding, I cannot understand why there should be any general prohibition, either on grounds of public policy or other grounds, to prevent a man saying:—"I no longer desire to cultivate this particular land, or to exercise this particular right of tenancy, or to remain in occupation of this particular piece of land." And unless I see that there is in the statute a very clear and distinct prohibition to his doing so,

(1) Weekly Notes, 1883, p. 7. (2) Weekly Notes, 1883, p. 207.

I shall certainly not go to the length of holding that there is any such prohibition. It is not pretended that the ex-proprietary interest acquired by Gaya Singh upon the sale of his proprietary rights to the plaintiff was sold or transferred to the plaintiff for money consideration or the equivalent. What the compromise does say is that Gaya Singh undertakes never, now or at any future time, to make any claim to the *sír* land or to raise any claim to his ex-proprietary rights. I need not discuss the possible difficulty that might arise in regard to the other incidents of s. 9 of the Rent Act, namely, that which is concerned with the rights and interests of the parties interested in the cultivation with the occupancy-tenant, because in this particular case those parties joined in the compromise by which Gaya Singh made the relinquishment that he did.

Under these circumstances I am of opinion that the lower appellate Court took a right view and placed a proper construction upon what was done by Gaya Singh at the time of the compromise of 1885, and that the decree has been rightly given to the plaintiff by which he has been declared entitled to participation in the *sír* appertaining to the zamíndári interest to the extent of a ⅛ interest in the *sír* enjoyed by Gaya Singh who relinquished all claims to that interest.

I dismiss the appeal with costs.

KNOX, J.—I will not go over the facts of this case, as they have already been fully given by my learned brother Straight. I fully concur in what has been said and in the decree which he proposes to pass in this appeal. From a careful consideration of the facts of this case, and more especially from the terms in which the compromise is expressed, I am of opinion that Gaya Singh when he had executed the compromise then and there did not transfer, but voluntarily abandoned, his ex-proprietary rights in the *sír* land. The words used in the compromise which relate to the transfer of zamíndári rights differ from those which relate to the abandonment of the ex-proprietary tenure. The words are these :—

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"Ek suls hissa par Udit Singh mudailah mai jumla hakuq zamìndári mai ek suls haq sír sakit-ul-milkiyat va do suls hissa par mudai malikana va zamíndárana kabiz va dakhil rahe aur ek suls haq kasht sakit-ul-milkiyat se musta'fi hain."

I see nothing in the Rent Act of 1881, by which any such voluntary vacation of tenure by a person who has acquired an ex-proprietary right is prohibited.

For these reasons I agree in the decree proposed.

Appeal dismissed.

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June 2.

Before Mr. Justice Mahmood.

RAM LAL DUBE AND OTHERS (JUDGMENT DEBTORS) *v.* HAR NARAIN AND ANOTHER (DECREE-HOLDERS) *

Execution of decree—Decree conditional on payment of a sum certain within a fixed time—Payment after time specified in decree.

A Court having framed a decree conditioned on the payment by the plaintiff of a sum certain within a specified time has no power to extend the time for payment after the period mentioned in the decree has elapsed. *Raja Har Narain Singh* v. *Chaudhrain Bhagwant Kuar* (1) referred to.

The facts of this case sufficiently appear from the judgment of Mahmood, J.

Mr. *Niblett*, for the appellants.

Munshi *Jwala Prasad*, for the respondents.

MAHMOOD, J.—The facts of this case as they have been put before me by Mr. *Niblett* for the appellants and Mr. *Jwala Prasad* for the respondents, may be stated to be the following:—

The decree-holders, respondents, are alleged to have executed a usufructuary mortgage with possession in favor of the judgment-debtors, appellants, about thirty years ago. Under the mortgage the mortgagees are admitted to have been placed in possession, and on the 2nd October 1888, the decree-holders, respondents, obtained

* Second appeal No. 35 of 1890 from a decree of E. J. Kitts, Esq., District Judge of Jaunpur, dated the 19th September 1889, confirming a decree of Babu Promotho Nath Banerji, Munsif of Jaunpur, dated the 15th July 1889.

(1) I. L. R 13 All., 300.

a decree for possession of the property by redemption on payment of Rs. 40, payable within 60 days from the date of the decree.

The terms of this decree, dated the 2nd October 1888, are important, because, in my opinion, the fate of this case turns upon the terms of the decretal order which is as follows :—

یہہ ڈگری و حکم ہوا کہ دعوی مدعی باسطے انعکاک رہن اِس شرط سے ڈگری ہو کہ مدعیان اندر ساٹھہ یوم کے آج کی تاریخ سے چالیس روپیہ مدعاعلیہم کے باسطے عدالت میں جمع کریں بقیہ دعوی ڈسمس ہو — مدعیان خرچہ اپنا اور مدعاعلیہم کا ادا کریں *

This may be translated into English in the following words almost literally :—

" It is ordered and decreed that the plantiffs' claim for redemption of the mortgage be decreed, subject to the condition that the plantiffs do deposit Rs. 40, in Court within 60 days from to-day for the defendants; the rest of the claim be dismissed, the plaintiffs paying their own costs and also the costs of the defendants."

I have quoted the exact terms of the decree in order to indicate the ground upon which my judgment will proceed, irrespective of the question whether or not this decree was properly made or properly framed. The decree became final and its terms cannot be interfered with by the Court executing the decree.

What happened next was that on the 21st May 1889, the decree-holders, respondents, made an application for execution of the decree of the 2nd October 1888, depositing with their application the above-mentioned sum of Rs. 40. The said sum was apparently accepted by the Court and ordered to be deposited, but on the same day the office reported that the deposit was in contravention of the terms of the decree of the 2nd October 1888. But notwithstanding this, the Court executing the decree allowed the application to be registered by its order of the 22nd May 1889.

The application having thus been registered, objections were raised to it by the judgment-debtors (appellants before me) mainly upon the ground that, by the date of the terms of

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the decree itself, that decree ceased to be capable of execution, since the period for deposit had already elapsed.

These objections were disallowed by both the Courts below and this second appeal has been preferred against the order of the lower appellate Court confirming the decree of the Court of first instance.

Now it seems to me, in the first place, that the main ground upon which the judgment of the lower appellate Court proceeds is that under the second paragraph of s. 93 of the Transfer of Property Act (IV of 1882) the judgment-debtors, appellants, mortgagees, were bound to seek an order for foreclosure or sale of the property to which the decree of the 2nd October 1888, related. This seems to be an erroneous view of the law. A careful perusal of that paragraph indicates that an order for foreclosure or sale does not concern a mortgage such as that in this case, which is a usufructuary mortgage with possession. That paragraph has therefore no application, and I may say that the provisions of clause (*a*) s. 67 of the same enactment fortify the view that a usufructuary mortgagee is not entitled as such to have the right of bringing the mortgaged property to sale.

I need not dwell upon this aspect of the case, because the terms of the decree of the 2nd October 1888, are themselves clear and specific, limiting the right of redemption to 60 days, and those terms, whether right or wrong, must be adhered to by the Court executing the decree.

In arguing the case Mr. *Jwala Prasad* for the respondents has properly conceded that no order was made by the Court extending the period mentioned in the decree for the payment of the mortgage-money, and the learned vakil also conceded that the mere circumstance of the deposit being received by the Court on the 21st May 1889, cannot amount to an order extending the period of 60 days which was prescribed by the decree.

The principle laid down by their Lordships of the Privy Council in a recent unreported case of * *Rája Har Narain Singh* v. *Chaudh-*

* Since reported, I. L. R. 13 All. 300.

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rain Bhagwant Kuar (decided on the 27th January 1891), is that when a period is fixed, as in that case it was fixed, by order of the Court under s. 521 of the Code of Civil Procedure for delivery of an award, and that period has elapsed, a subsequent granting of another period cannot amount to an extension of time already elapsed.

Applying the principle of that ruling to the present case, I am of opinion that after the lapse of 60 days allowed by the decree of the 2nd October 1888, which decree became final, the decree-holders, respondents, forfeited their right to execute the decree, and that the order of deposit made so late as 21st May 1889, by the Court executing the decree, could not cure the effect of the lapse of the period.

The proper order to be made in this case was that the application for execution should stand dismissed.

I make that order now by saying that I decree the appeal, and, reversing the decrees of both the lower Courts direct that application for execution stand dismissed, and that the decree-holders, respondents, do pay the costs of this litigation in all the Courts to the judgment-debtors, appellants.

Appeal decreed.

Before Mr Justice Straight.

1891
June 15.

USUF KHAN AND OTHERS (DEFENDANTS) *v* SARVAN AND OTHERS (PLAINTIFFS) *

Occupancy holding, transfer of—First and second mortgages of occupancy holding—Suit by second mortgagee to eject first mortgagee in possession.

Where an occupancy holding was mortgaged under two successive mortgage deeds to different parties, and the mortgagees under the first mortgage having been put in possession, the mortgagees under the second mortgage sued to eject them.

Held that, both parties being wrong-doers, inasmuch as both mortgages were illegal, the defendants, who were in possession, had a right, as against the plaintiffs, to retain possession.

The fact of this case are fully stated in the judgment of Straight, J.

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* Second appeal No 1557 of 1888 from a decree of Maulvi Sayyid Akbar Husain, Officiating Subordinate Judge of Ghazipur, dated the 16th July 1888, confirming a decree of Sayyid Zain-ul-Abdin, Munsif of Korantádih, dated the 28th April 1888.

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USUF KHAN v. SARYAN.

Mr. *Amir-ud-din*, for the appellants.

Babu *Durga Charan*, for the respondents.

STRAIGHT, J.—This appeal has reference to a suit brought by the plaintiffs-respondents upon a basis of a mortgage for a period of ten years of an occupancy holding of Musammat Sugra, dated the 30th September 1886.

Musammat Sugra apparently acquired the occupancy right of one Basawan on the 5th May 1874, and that person had, prior to the sale to her, mortgaged possessorily the occupancy holding under two mortgages. On the 10th March 1885 Musammat Sugra mortgaged the occupancy holding with possession to the defendants-appellants for the sum of Rs. 599-10-6, which amount included the sum of Rs. 85-10-6 paid in respect of one prior mortgage and Rs. 299 paid in respect of the other, and there was a present advance of Rs. 115 in cash. Now I have said that under the mortgage of the 10th March 1885, the defendants-appellants became entitled to possession of the occupancy holding, and we must take it from the form the decrees of the two lower Courts have taken that they were of opinion that the defendants got possession and were in possession at the date of suit. This explains the alternative prayer of the plaintiffs to their claim for declaration of title, if in possession, namely, that if found to be out of possession their title be declared, and they be given possession. Both the Courts below have found for the plaintiffs and have given a decree for ejectment of the defendants. This appeal is preferred to this Court by the defendants, and the ground upon which it has been put, and which seems to me to be a substantial and sound ground, is that the plaintiffs on the one hand by a later document being transferees from an occupancy tenant, and the defendants on the other hand by an earlier document being transferees of an occupancy tenant and in possession of the occupancy holding, they cannot be disturbed by a party like the plaintiffs who have an infirmity in their created by the provisions of s. 9 of the Rent Act; that is to say, if the plaintiff is a transferee of an occupancy tenant as prohibited by s. 9 of the Rent Act he has no title that he can sustain in a

Court of justice. Now I am committed to this view that a lessee for a term of years, as in this case for a term of 10 years, is a transferee of the right of occupancy. I have already expressed the view tha I take upon the point in *Wali Muhammad* v. *Raghubar* (1) and *Nugpal* v. *Sital Puri* (2) and also expressed my views in the Full Bench ruling in *Abadi Husain* v. *Jurawan Lal* (3) which views, I may remark in passing, were not given expression to without due advertence to s. 117 of the Transfer of Property Act. According to these rulings I am committed to the opinion that a lease of an occupancy holding of a term of years is a transfer, in other words, that, as contemplated by s. 9 of the Rent Act, it is a transfer of a right of occupancy, that is to say, of a right to occupy the land. Now s. 9 was, in my opinion, framed in the interests of the persons who were jointly interested in the cultivation with those who had the occupancy right, and it was intended to limit the transfer of the occupancy right within a certain circumscribed area of persons who are mentioned in the section. As I pointed out to the learned pleader for the plaintiffs-respondents, if a lease was made by an occupancy tenant for a period of 10 or 20 years, as the case might be, of an occupancy right, the interest of the persons who would be entitled upon the occupancy tenant's death to take the occupancy holding might be very seriously prejudiced. In the present case a *parda-nashin* lady was the occupancy tenant and it might well be that the party who would succeed upon her death would be a male who would wish for his personal advantage and profit to cultivate the occupancy holding with his own hand. I have heard nothing in the course of the discussion of the case which leads me to depart from the opinion that I have expressed in the two rulings to which I have referred. I think therefore that where there is a conflict between two wrongdoers, as the plaintiffs and the defendants are, the person who is in possession of the property is entitled to be maintained in possession, and that the plaintiffs in this case are not entitled to succeed. This being so, I

(1) Weekly Notes 1889, p. 145. (2) Weekly Notes 1890, p. 3.
(3) I. L. R 7 All. 866.

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decree the appeal, reverse the decrees of both the Courts below, and dismiss the plaintiffs' suit with costs in all the Courts.

KNOX, J.—As regards the facts of the case I will not recapitulate them, as I agree entirely with my brother Straight in the view that he has taken of them, and I only propose adding what I consider to be the state of the law as it now stands. As regards the question whether or not the right of occupancy which the law has conferred upon occupancy tenants is capable of transfer by way of lease or not, I hold that there can be no other interpretation of the word transfer than the one which includes the process whereby one person conveys to another for consideration the right to cultivate the land, whether the right be so conveyed for one or more years. Under Act XII of 1881, s. 9 it is expressly stated that "The right of tenants at fixed rates may devolve by succession or be transferred. No other right of occupancy shall be transferable in execution of a decree, or otherwise than by voluntary transfer between persons in favor of whom as co-sharers such right originally arose, or who have become by succession co-sharers therein."

I do not intend now to discuss what was the object in view of those who framed the law. I have to deal with the words of the Act as they stand, and I can find nothing in the Act which entitles me to construe the word transfer otherwise than it is generally accepted in all statutes so far as I know. It is contended that the chapter relating to leases contained in Act IV of 1882, so far as these provinces are concerned, is not applicable to agricultural leases, and the contention is that the definition of lease contained in s. 105 is therefore not applicable to agricultural leases; but I do not see how this alters the question. Granted that the definition contained in s. 105 is not to be applied to agricultural leases we are driven back to the construction of the words transfer and transferable in the way such words are ordinarily interpreted. I also concur in holding that in the case of two wrong doers the person in possession is entitled to be maintained in possession.

For these reasons I entirely concur in the order made by my learned brother.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Tyrrell.

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June 25.

RUSTAM ALI KHAN (DEFENDANT), *v.* ABBASI BEGAM (PLAINTIFF)*.

Wajib-ul-arz, effect of as evidence of village custom—Wajib-ul-arz not signed by lambardár or co-sharers—Construction of wajib-ul-arz.

Where a *wajib-ul-arz* was not signed by the lambardár or by any of the co-sharers of the village for which it was framed, but was found to have been in existence without having been questioned by any of the parties who might have been affected thereby for a period of some thirteen years: *Held* that the *wajib-ul-arz* might be taken as *primâ facie* evidence of the custom of the village for which it was framed.

The said *wajib-ul-arz* contained a clause relative to pre-emptive rights to the following effect:—"When any *muafidár* in the *patti* desires to transfer his share, then first a shareholder in the *patti* takes it, and if he does not take it, then another man who desires to take it takes it" *Held* that this clause was declaratory of the village custom and that it was not intended thereby to adopt the Muhammadan law of pre-emption.

The plaintiff-respondent sued (on the 9th November 1889) to enforce her right of pre-emption in respect of certain land sold by two of the defendants to the third, alleging that she was a sharer in the land sold and, as such, entitled to pre-empt under the terms of a certain *wajib-ul-arz* prepared in 1874, and that, immediately on hearing of the sale, she had tendered the price to the defendants. The defendant vendee alone appeared and pleaded that the plaintiff was not a co-sharer; that the land was *muáfi* and no *wajib ul-arz* was recorded in respect thereof; and he also traversed the plaintiff's allegation of tender of price. The *wajib-ul-arz* in question was not signed by any of the co-sharers but was prepared by the settlement officer and attested by the patwári. The Court of first instance (the Munsif of Farakhabad), holding the *wajib-ul-arz* on which the plaintiff's claim was based to have been prepared in accordance with law, decreed the claim. The defendant vendee appealed to the District Judge, who upheld the decision of the Munsif and dismissed the appeal. The defendant thereupon appealed to the High Court.

* Second appeal No 1375 of 1888, from a decree of W H. Hudson, Esq., District Judge of Farakhabad, dated the 26th May 1888, confirming a decree of Babu Madan Mohan Lal, Munsif of Farakhabad, dated the 12th December 1887.

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KUSTAM ALI KHAN v. ABBASI BEGAM.

Mr. *C. H Hill* and Pandit *Ajudhia Nath*, for the appellant.

The Hon'ble Mr. *Spankie*, for the respondent.

EDGE, C. J., and TYRRELL, J.—This is a second appeal arising out of a suit for pre-emption brought upon a *wajib-ul-arz*. The appellant before us is the defendant. The *wajib-ul-arz* in question was framed in May 1874. It was not executed by any *lambardár* or any of the co-sharers. It has not been shown that any person intrested in the *mahál* took any steps to challenge the correctness of the *wajib-ul-arz* before the settlement was confirmed by the Local Government, or indeed until the legality of the *wajib-ul-arz* was challenged by the defendant in this suit. Although, no doubt, it would have been better if the *wajib-ul-arz* had been attested by the *lambardár* or *lambardárs*, if any, and by the co-sharers, or some of them, we cannot, at this distance of time, and having regard to the fact that the correctness of the *wajib-ul-arz* remained all these years unchallenged, hold that it is not *primâ facie* evidence of the village rights and customs recorded in it.

The next question is, what is the meaning of the particular clause which relates to pre-emption? That clause is as follows:—"When any *muáfidár* in the *patti* desires to transfer his share, then first a shareholder in the *patti* takes it; and if he does not take it, then another man who desires to take it takes it." We cannot construe the clauses in a *wajib-ul-arz* as if they had been carefully prepared by a conveyancing counsel. We must try to find what was probably meant, so far as we can. Now, we think this clause shows that there was a local village custom of pre-emption, and that by that custom any shareholder in the *patti* was entitled to buy in preference to an outsider, and that the custom was not the custom of the Muhammadan law, pure and simple, but partook of the character ordinarily found in *wajib-ul-arzes*, and that it was the duty of the shareholder desiring to transfer to give a co-sharer an opportunity of purchasing. Every *wajib-ul-arz* has to be construed, so far as is possible, on its own wording. Few *wajib-ul-arzes*

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which have come before us are worded precisely alike. This *wajib-ul-arz* in question was anterior to the issue of the rules to settlement officers of 1875. We accordingly, holding the views we do, dismiss this appeal with costs.

Appeal dismissed.

1891
May 15

Before Sir John Edge, Knight, Chief Justice, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

ANGAN LAL (DEFENDANT), *v.* MUHAMMAD HUSAIN AND OTHERS (PLAINTIFFS.)*

Construction of document—Deed—Sale-deed or deed of gift.

A deed which purported on the face of it to be a deed of sale contained a recital that the consideration had been received by the vendor and returned as a gift to the vendee. The words used were—"Hath * * * nawasi apne ki bai katai karke zar-i-saman tamâm wo kamâl wasul pakar bakhsh diya aur hiba kardiya."

The deed was stamped as a sale-deed and was duly registered, but no possession was given under it, and there was apparently no evidence external to the deed that any consideration had passed between the parties.

Held by EDGE, C. J., and TYRRELL and KNOX, J.J., that in the absence of any evidence external to the deed itself of the intention of the parties, the deed in question must be taken to be a deed of sale.

per MAHMOOD, J., *contra.*—The lower appellate Court having found that no consideration had passed, the deed must be considered as a deed of gift, though wearing the appearance of a sale deed, and, possession not having been given, under Muhammadan Law the gift was invalid.

The facts of this case sufficiently appear from the judgments of of Edge, C. J., and Mahmood, J.

Mr. T. *Conlan* and the Hon'ble Mr. *Spankie,* for the appellant.

The respondents were not represented.

MAHMOOD, J.—This is an appeal preferred from the judgment of the late Mr. Justice Brodhurst as to the interpretation of a deed to which reference will be made by me presently.

The case out of which the appeal arises was a second appeal, and it came before my brother Straight and the late Mr. Justice Brodhurst, and they dissented in opinion and the decree passed by Mr. Justice Brodhurst was that the appeal should stand dismissed.

* Appeal No. 26 of 1889 under section 10 of the Letters Patent.

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ANGAN LAL v. MUHAMMAD HUSAIN.

The judgment of my brother Straight was that the appeal stand decreed and the plaintiff's claim should also stand decreed.

This is the state of things under which this appeal has been preferred as an appeal under s. 10 of the Letters Patent. What I have to consider is, whether the appeal should or should not prevail, and, in doing so, it is important to state the facts which require consideration for the purpose of deciding the point of law which arises in the case. Those facts are these :—

On the 3rd June 1878, Musammat Wilaiti Begam executed a document in favor of her daughter's daughter, Ilahi Begam, purporting to be a deed of sale in lieu of Rs. 700, and that document was duly registered. Matters stood thus when, on the 1st August 1884, Ilahi Begam, the vendee of the deed of the 3rd June 1878, executed a document purporting to be a deed of sale in favor of Angan Lal, present plaintiff-appellant, for a sum of Rs. 1,000, and this document was also registered. This happened as any other documents of this description may be executed, and naturally, as too often occurs in India, such documents are questioned as to their validity.

The plaintiff came into Court claiming possession of property which he alleged that he had purchased from Ilahi Begam under the sale-deed of the 1st August 1884, that it is to say, such rights as she, Ilahi Begam, possessed under the earlier deed of 3rd June 1878.

The suit was resisted upon the ground of a total denial of title in the plaintiff, either under the deed of the 3rd June 1878, or the deed of the 1st August 1884, and it is clear that under these circumstances it was for the plaintiff to prove, and not for the defendants to disprove, that the plaintiff had full title under either of those deeds.

Now this being so, it is important in the first place to consider the terms of the deed of the 3rd June 1878. The document need not be read fully, though it is necessary before I interpret it to say that I have read the whole of it. It is necessary also to cite some

parts of the document upon which Mr. *Conlan* has relied. The words of the document are these :—

هاتهه نواسي اپني کے بيع قطعي کر کے زر ثمن تمام و کمال وصول پاکر بخشش ديا اور هبه کر ديا اور شی مبيعه مذکوره کو اپنے قبضه سے نکالکر بيچ قبضه مشتريه مذکوره ديديا اور مشتريه مذکوره شی مبيعه مذکوره پر مثل ذات مجهه بائع قابض اور دخيل هووے بعد وقت بيع سے شی مذکوره ميں کچهه حق و حصه مجهه بائع باقي نهيں رها اب مجهکو اور ميرے ورثاء کو صحت اِس بيعنامه و بخشش زر ثمن ميں کچهه قيام عذر و اطراف نهيں هی اور نه هوگا لهذا يهه چند بانيں بطور بيعنامه و بخشش زر ثمن کے لکهه دی هی که سند هو اور وقت حاجت کے کام آويں فقط تحرير ۳ جون سنه ۱۸۷۸ع*

Now these words are words of which the meaning requires specific determination, because, indeed, if they mean that the document was a deed of sale, then, undoubtedly, the conclusion is right that Angan Lal is entitled to his decree.

Reading these words as I have done, they leave no doubt in my mind that it was not a deed of sale, though it was a pretended deed of sale, as apparent from the deed itself ; and it was, as has been held by the Courts below and by Mr. Justice Brodhurst in this Court, simply a deed of gift. It is therefore important to consider whether or not there should have been delivery of possession under the deed.

Now upon this point there has been some doubt as to whether or not the Muhammadan law applies to such a case. A Full Bench of this Court has decided the question in the affirmative in cases of pre-emption (*Musammat Chandu* v. *Hakim Alimuddin*) (1), the same principle has been applied also to questions of gift (*Nizamuddin* v. *Zabeda Bibi*) (2), and so far as the interpretation of the document now in question is concerned, the Muhammadan law is the law which governs the adjudication of the case ; not only because this may be required by section 37 of the Civil Courts Act (XII of 1887), but also, because, even if there is no specific statute law, I think it has been held by their Lordships of the Privy Council that in such cases respecting transactions between

(1) N. W. P. H. C. Rep., 1874, p. 28. (2) 6 N.-W. P. H. C. Rep., 338.

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Muhammadans it is only administering the rules of justice, equity and good conscience to bear in mind what rules that law requires.

This being so, I have in the first place to determine whether the deed, as I have read it, is a deed of sale or a deed of gift. Mr. *Conlan* has referred us to the case *Rahim Bakhsh* v. *Muhammad Hasan* (1); the learned counsel has argued with much ability that the judgment does in some parts of it give color to the contention which is necessary for his case. The matter, however, is clear from the judgment in that case that, before a deed can be interpreted to be a deed of gift, or *Hiba-bil-aiwaz* or a deed of sale, it must be known what the conditions were under which the deed was executed, what its terms were, and what the consideration was upon which the contractual relation created by the engagement was established. So considered, the ruling does not support the learned counsel. The question then is, is the deed of the 3rd June 1878 a deed of gift or not? I have no hesitation in holding that when property is conveyed by what is merely called a gift, but is in exchange of property which is taken in consideration, that consideration being of a pecuniary character, the transaction is one called *Hiba-bil-aiwaz*, which stands upon the same footing as sale under the Muhammadan law. Equally am I certain that when there is only a pretension of such a state of things having occurred, and there is no proof that such things did occur, and when the document itself shows that such things did not occur, the transaction is neither a *Hiba-bil-aiwaz* nor a sale.

This, I understand, is what the learned Judge of the first Court held. Also I understand this interpretation of the deed was upheld by the lower appellate Court. I also understand that Mr. Justice Brodhurst, dealing with the findings of the Court below, held, to use his own words :—

"Whatever the intention of Musammat Wilaiti Begam in executing the deed may have been, I am quite satisfied, from her never having caused mutation of names in the Government records nor transferred possession up to the present time, that she had no

(1) I. L. R. 11 All. 1.

intention to relinquish possession of the property during her lifetime. Considering the near relationship that existed between the alleged vendor and vendee, the fact that the whole of the consideration money is said to have been immediately returned by the vendor to the vendee, and the other circumstances that have been above referred to, I think the learned Subordinate Judge has correctly found that the deed of the 3rd June 1878 is in reality nothing more than a deed of gift, and that it is void owing to possession not having been given."

In this finding I entirely concur. Upon a full consideration of the deed, and also upon the judgments which have been delivered in the Courts below, my own view is that the finding is one which must be accepted by us in second appeal, because it is finding of fact, not so far as the question of the interpretation of the deed is concerned, but certainly so far as the non-delivery of possession under the deed of the 3rd June 1878 is concerned. In saying so, the Privy Council ruling in *Durga Chowdhrani* v. *Jewahir Singh Chowdhri* (1) is helpful to explain how far Courts in second appeal can interfere with findings of fact. I suppose after this finding it will not be denied that no possession whatever was given by the so-called vendor to the so-called vendee under the deed of the 3rd June 1878 up to the date of the suit, which was the 12th January 1886, for this is a finding which cannot be questioned in second appeal. I have no doubt that the deed is not a deed of sale, because though it pretends to be a deed of sale, it contains in itself a statement that the consideration for such sale had been gifted away or relinquished or excused. This being so, I cannot hold it to be other than a simple deed of gift, as the Courts below have held, and, holding so, possession was absolutely necessary under the Muhammadan law which governs such a case. And it follows that the doctrine of notice applicable to *bonâ fide* transfers for value has no application to this case, there being no possession or ostensible ownership in the donee under whom the plaintiff claims.

(1) I. L. R. 18 Calc. 23.

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As to the necessity for possession for completing the right under a simple gift, the Legislature has had to consider this position in defining the meaning of gift in s. 122 of the Transfer of Property Act (IV of 1882); but while making this definition and, indeed, when framing the whole of the Act, they were careful, and for good reasons, to frame s. 129, which runs as follows:—

"Nothing in this chapter relates to gifts of movable property made in contemplation of death, or shall be deemed to affect any rule of Muhammadan law, or, save as provided by s. 123, any rule of Hindu or Buddhist law."

In the present case the findings of both the Courts below are, and the deed itself stated, that there was no passing of consideration and that there was no evidence to show that such consideration had passed. I think Mr. Justice Brodhurst was right in holding upon these findings that it was simply a deed of gift or *Hiba* under the Muhammadan law, and not a *Hiba-bil-aiwaz*, that is to say a contract which approximates a contract of sale.

This is an appeal under the Letters Patent, and I think, therefore, after what I have said, that this appeal should stand dismissed, but that, as no one appears for the respondents, no order as to costs is necessary.

EDGE, C. J.—This appeal has arisen out of a suit which was brought by the plaintiff against one Wilaiti Begam, her granddaughter, Ilahi Begam, and certain other persons, and in that suit the plaintiff claimed possession and a decree to eject the defendants. The plaintiff alleged his title to be by a purchase for valuable consideration under a deed of the 1st August 1884 from Ilahi Begam, and under a deed of sale of the 3rd June 1878 made by Wilaiti Begam in favor of Ilahi Begam. The plaintiff's title was denied by Wilaiti Begam. The other defendants did not dispute his title. It has been found by the Courts below that the plaintiff paid the Rs. 1,000 consideration of the sale-deed for the sale of the property to him by the deed of the 1st August 1884. It has been found also that the alleged consideration, Rs. 700, mentioned in the deed of the 3rd June 1878, was not paid; and it has also been found

that possession had never been given by Wilaiti Begam to Ilahi Begam, or anyone representing Ilahi Begam. The Courts below came to this conclusion and found that the deed of the 3rd June 1878 was not in fact a deed of sale but was a deed of gift, and on these findings the first Court dismissed the plaintiff's suit and the second Court dismissed his appeal. The appeal in this Court came on to be heard before my brother Straight and the late Mr. Justice Brodhurst. Mr. Justice Brodhurst accepting the finding that no possession had been given, and that no consideration had passed under the deed of the 3rd June 1878, and misinterpreting some passages in the judgment of one of the Courts below, which he read as a finding that the sale of the 1st August 1884 was collusive and fraudulent, delivered judgment dismissing the appeal. My brother Straight, on the other hand, held that the question of fraud and collusion did not arise in the case, as indeed it did not; and that there was no evidence to show that the consideration for the deed of the 3rd June 1878 had not been paid. He came consequently to the conclusion that the appeal to this Court should be allowed. Under the circumstance of this difference of opinion the appeal to this Court stood dismissed.

This appeal has been brought under s. 10 of the Letters Patent. In order to clear the ground, I may say that no one suggests that the finding of fact that possession never was given under the deed of the 3rd June 1878 should or could be questioned in second appeal. No one disputes the fact that, if the document of the 3rd June 1878 was a deed of gift, the Muhammadan law would apply, and, there having been no possession, the gift would fail. But the point which has been argued before us is simply this. It is contended, and, I think, rightly, that a finding of fact where there is absolutely no evidence to support it can be questioned in second appeal, because it is then a question of law. It is beyond doubt in this case that there has been no evidence given on the one side or the other to show either that the consideration mentioned in the deed of the 3rd June 1878 was paid or that it was not paid, beyond the evidence which the deed affords on the face of it. In this

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light we have to construe to the best of our ability the deed in question; and on this part of the case I may say that I speak with very considerable diffidence, knowing little or nothing of the vernacular, and sitting beside my brother Mahmood, who is a master of his own language. However, I have to give my opinion for what it may be worth. Now there is one thing that is quite clear, that the deed professes to be on the face of it a sale-deed. It bears the stamp which was required for a sale-deed, in respect of such consideration as was mentioned in it. The stamp would have been insufficient if the deed had been a deed of gift. This is only a slight indication to my mind as to what the parties intended the deed in question to be. Then we come to the actual words of the deed. In express terms it states that the consideration had been received. This is beyond doubt. But, following these words, are the words which have raised a doubt in this case. My brother Mahmood kindly placed before me two different dictionaries as authority, and in each of those dictionaries I find that the words *bakhsh dena* bear the meaning 'to give, to grant, or to forgive.' There are other words which follow them and which bear the meaning, so far as I can ascertain from the dictionaries, of granting or conferring. Then the question is, do the words to which I have referred mean, read with the context, that the consideration was foregone, in the sense that it had never been received, or is the meaning, whether it represents the truth or not, that the consideration had been received and had been given back or returned. Beyond the wording of the deed there is no evidence as to what the transaction was. It appears to me, forming the best judgment I can, that whether the parties were in fact carrying out a transaction of sale or a transaction of gift, the passage read as a whole is evidence that a sale at a fixed price was made and the consideration having been paid was returned to the vendee. That is my interpretation of the particular document. One may suspect, looking at the document, that it may have been in truth merely a transaction of gift. On the other hand, against such an impression being well-founded, there is the stamp, and there is the fact which has been found by the Courts below, that Wilaiti Begam executed two almost precisely similar documents at about the same

time in favor of other members of the family, and that those members of her family made use of them as sale-deeds and sold the property to others. In this case it appears to me that the onus of proving that there was no consideration paid for the deed of the 3rd June 1878, and that it was a deed of gift and not a deed of sale, was upon Wilaiti Begam. It is quite true, as my brother Mahmood has said, that a plaintiff coming into Court in a suit for ejectment is bound to prove his title, but in this case as part of the proof of title against the only person who disputed it the plaintiff put in evidence the deed which had been executed by Wilaiti Begam on the 3rd June 1878, and which on the face of it, truthfully or not, stated most distinctly that she had received the Rs. 700 as consideration. It was, in my judgment, under these circumstances for Wilaiti Begam to show that the statement in the deed under her hand was incorrect and that no consideration had ever been paid, and until she established that by evidence, I think a Court of law was bound on the document to find, as against her, that the consideration had passed, she having stated the fact in the deed under her own hand. There is only one other matter to which I need refer, and it is this. Undoubtedly in cases where we may apply the rules of justice, equity and good conscience, we are bound to apply them, and if it be the fact that the deed is ambiguous on the face of it, and that it may be considered by one person as a deed of gift and by another as a regular deed of sale, in my opinion, according to justice, equity and good conscience, we should hold against the person who executed the deed that it was a deed of sale, and so protect the interests of the innocent purchaser who treated the deed as a deed of sale, and, acting upon it as such, paid Rs. 1,000 consideration for the transfer of the property to him. For these reasons I would allow the appeal and decree the plaintiff's suit for possessions with costs in all the Courts.

TYRRELL, J.—I entirely agree with everything that has fallen from that learned Chief Justice, and I would only add a few words on the terms of the deed in question. Looking to the phraseology of the deed, I am of opinion that my brother Straight was right in

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regarding it as a sale-deed. The terms seem to me to indicate explicitly that Musammat Wilaiti Begam made an absolute sale of certain property for Rs. 700 to Ilahi Begam, and, "having received the sale consideration in full," granted that money to her vendee. She further stated in the deed that "I, the vendor, have no share or right in the sold property since the time of the sale. Now I and my heirs neither have nor shall have any objection to the validity of the sale and of the gift of the sale consideration. Therefore I have executed these few words by way of a deed of sale and gift of sale consideration." The vernacular runs as follows :—

"Hath * * * nawasi apneki bai katai karke zar-i-samman tamâm wa kamâl wasul pakar bakhsh diya aur hiba kardiya." Again, "lihaza yih chand batain bataur bainamah wa bakhshish zar-i-samman ki likhh din," and again, "Sihat is bainamah wa bakhshish zar-i-samman men * * *."

The first sentence avers that the "sale was complete or absolute (bai katai); that the price had passed (wasul pakar), and was afterwards given and presented to the vendee." It was suggested that "bakhsh" in this passage should be read in its secondary sense of "excused or forgiven;" but here it is coupled with the words "aur hiba kardiya," which can only mean "I have given," and I must therefore interpret these word "Bakhsh diya" as also meaning "I have given." The second phrase distinctly defines the deed as an instrument of double import, first, of sale to the vendee, and secondly, of gift to her of the consideration money; and the third paragraph binds the vendor not to question this "sale-deed" and "gift of the price." After execution, this instrument was registered as a sale-deed, and I find that, while it contains all the constituents of a "sale" as defined in sec. 54 of the Transfer of Property Act, it does not fall under the definition of a gift as given in s. 122 of the same Act. It is, of course, true that s. 129 of the Act forbids me to apply any of the sections 122 to 128 so as to affect any rule of Muhammadan law; but I am not using s. 122 for any such purpose, but as a guide only to the proper definition of a gift, and I look similarly to s. 54 for that of a sale, there being no limitation to latter section such as is found in s. 129 in regard to gift. The

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deed in my judgment is in terms and effect a deed of sale, and I have no materials for forming an opinion whether any, or what, occult meaning or design may underlie these terms. I therefore concur in the order of the learned Chief Justice.

KNOX, J.—I entirely concur with all that has been said by the learned Chief Justice with reference to the interpretation that should be put upon the document and upon the consequences which should follow from that interpretation. I need not allude to the language in which the document is couched, because it has been given in full by my brother Tyrrell, and I agree with him in the interpretation which he has placed upon the words of the document. Whatever may have been the real nature of the transaction, I am of opinion that it was intended by the executants of the document that it should bear to the world the face of a deed of sale and not that of a deed of gift. It was, under the law then current and directing what stamp such deed should bear, stamped as a deed of sale and not as a deed of gift. It was registered, and it seems to me that any person who sought to know under what liabilities the property stood, or to ascertain who was entitled to it, would have had no means of knowing the nature of the transaction except from the deed now before us, and, on this ground, as well as on the grounds already stated, I think it would most inexpedient to put upon it any interpretation other than that of a deed of sale. I therefore concur in the order which the learned Chief Justice and my brother Tyrrell propose to pass in the case.

Appeal decreed.

FULL BENCH.

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November 4.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Brodhurst, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

JANGU AND OTHERS (DEFENDANTS) *v.* AHMAD ULLAH AND OTHERS (PLAINTIFFS).*

Muhammadan law—Public mosque—Right of all Muhammadans without distinction of sect to use such mosque for the purposes of worship—Right to say "âmîn" loudly during worship.

Where a mosque is a public mosque open to the use of all Muhammadans without distinction of sect, a Muhammadan who, in the *bonâ fide* exercise of his religious

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duties in such mosque, pronounces the word "*ámín*" in a loud tone of voice, according to the tenets of his sect, does nothing which is contrary to the Muhammadan ecclesiastical law or which is either an offence or civil wrong, though he may by such conduct cause annoyance to his fellow-worshippers in the mosque But any person, Muhammadan or otherwise, who goes into a mosque not *bonâ fide* for religious purposes, but *malâ fide* to create a disturbance there and interferes with the devotion of the ordinary frequenters of the mosque, will render himself criminally liable.

The plaintiffs in this case, members of a sect of Muhammadans calling themselves *Mowahhids* or *Gair Mokallids*, sued the defendants, who were of another sect, called *Hanafis* or *Mokallids* for a declaration that they were entitled to worship in a certain mosque, and, in the course of prayers in such mosque, to pronounce the word '*ámín*' audibly. The defendants pleaded that the suit was not cognizable by a Civil Court; that the plaintiffs had no concern with the mosque, which had been built by Hanafis, and in which they, as Hanafis, had a right to worship to the exclusion of other sects. The Court of first instance (the Munsif of Meerut) found that the suit was cognizable by a Civil Court, and gave the plaintiffs a decree in the following terms:—"It is therefore ordered that the plaintiffs are entitled to say the word '*ámín*' loudly, but not at the top of their voice, nor so as to trouble the ears of a fellow-worshipper."

On appeal by the defendants, the Subordinate Judge, agreeing with the Court of first instance that the suit was cognizable by a Civil Court, found that the mosque was a public mosque, built about 400 years ago by a person whose sect was unknown, and that neither party had established an exclusive right, by prescription or in any other way, to worship in it; but that both parties as members of the Muhammadan community had an equal right to perform their prayers and worship there according to the rites and ceremonies of their respective sects. The Subordinate Judge accordingly modified the decree of the Munsif in so far as that decree restricted the tone of voice in which the plaintiffs were entitled to say '*ámín*,' and gave the plaintiffs the decree which they prayed for: also granting an injunction against the defendants restraining them from interfering with the plaintiffs going into the mosque and worshipping there according to the usages of their sect. The defendants then appealed to the High Court.

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The appeal came on for hearing before Mahmood and Brodhurst, J.J., who, by their order of the 8th June 1887, referred it to the Full Bench for disposal.

Pandit *Sundar Lal* for the appellants.

The Hon'ble Mr. *Conlan* and Mr. *Amir-ud-din* for the respondents.

EDGE, C.J.,—This was a suit which originated in an order passed by the Magistrate of Meerut in 1884, by which he bound the parties before him over to keep the peace, and prohibited the plaintiffs from repeating aloud, in a certain mosque, the word '*ámín*' at the end of the prayer.

The plaintiffs brought this suit for a declaration of their right to repeat the word aloud in the mosque, and to restrain the defendants from interfering with them in the performance of their religious duties. There was another question, namely, as to raising the hands, which does not arise in the appeal before us. The plaintiffs succeeded in the Munsif's Court, which decided that they were entitled to say the word '*ámín*' loudly, but not at the top of their voice, nor so as to trouble the ears of their fellow-worshippers—a decision probably right enough in intention, but so vague as to leave the parties very much where they were before; beyond giving the plaintiffs a right to repeat the word '*ámín*' aloud. There was an appeal by the defendants from the decree of the Munsif, and objections were filed to the portion of the Munsif's decree which limited apparently the tone of voice in which the word '*ámín*' might be repeated. In first appeal the Subordinate Judge of Meerut found as a fact that the mosque in question was a public mosque, in which all the Muhammadans were entitled to say their prayers. The defendants here contend that the mosque was one the use of which had been restricted to those Muhammadans who followed doctrines or ritual of Imam Abu Hanifa. The finding of the Subordinate Judge disposed of this contention, and that finding is in the following terms :—

"The conclusion I arrived at is that the mosque was originally built some 400 years ago by some Muhammadan, whose name no

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one is able to give, nor is it known to which particular sect he belonged, and that it has been since used as a public place of worship without distinction by all the Muhammadans who cared to go there."

Now this is a finding that it is a public Muhammadan mosque : as I read the written statement of the defendants, it is not suggested that the plaintiffs *malâ fide* repeated aloud during their devotion the word "*âmîn*." It is only alleged that the plaintiffs dissented from the ritual which had been observed. It is found as a fact that the plaintiffs are Muhammadans, and it is not found that they either did or desired to do anything in the mosque which was contrary to the Muhammadan ecclesiastical law. I am of opinion, therefore, that the appeal must fail. There can be no doubt that a Muhammadan or any one else who went into a mosque not *bonâ fide* for religious purposes, but *malâ fide* to create disturbance there, and interfered with the devotion of the ordinary frequenters of the mosque, would bring himself within the reach of the criminal law. The only order which we pass here is that the appeal be dismissed with costs.

Straight, Brodhurst, and Tyrrell, J.J., concurred.

MAHMOOD, J.—I entirely agree in what has fallen from the learned Chief Justice, and should not have added anything but for the circumstances that I was a party to the order of reference and also because the case relates to a subject upon which, on a former occasion, I was unfortunately unable to agree with the late learned Chief Justice of this Court and his honorable colleagues, who delivered their judgments in *Queen-Empress* v. *Ramzan* (1) without having had an opportunity of considering the views which I expressed in my judgment in the same case. I have referred to that case, though it came before this Court in its Criminal Jurisdiction, because the point there raised was identical with the one which has arisen here in the form of a civil suit, and which we in the Full Bench are now called upon to determine. The principle of deciding the question must, however, be the same in both cases.

(1) I. L. R., 7 All., 461.

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The main object of the suit is to obtain a declaration that the plaintiffs are entitled to worship in the mosque pronouncing the word '*ámín*' audibly in the course of the prayers, and also an injunction restraining the defendants from obstructing the plaintiffs in performing worship in the mosque according to their tenets.

The suit was resisted by the defendants mainly upon the ground that the suit was not cognizable by the Civil Court, that the plaintiffs were heretics and were not entitled to say '*ámín*' aloud in the mosque.

The controversy thus raised between the parties is exactly of the same nature as that which I had to consider in the case of *Queen-Empress* v. *Ramzan* (1); but the original Arabic authorities which I quoted in delivering my judgment in that case are not to be found in the published report. The original judgment, however, is now before me, with the original authorities, and I wish to repeat them here, with such introductory passages from my judgment as are equally pertinent to this case. In introducing those texts, I said (at p. 470) that the word *ámín* is of Semitic origin, being used both in Arabic and Hebrew, and has been adopted in prayers by Muhammadans as much as by Christians.

The word does not occur in the *Kurán*, but, in conformity with the "*Sunna*," or the practice of the Prophet, it is regarded by Muhammadans as an essential part of the prayers, as a word representing earnestness in devotion. The word is pronounced at the end of the first chapter of the *Kurán*, which consists of the following prayers :—

"Praise be to God, the Lord of all creatures; the most merciful: the king of the day of judgment. Thee do we worship, and of thee do we beg assistance. Direct us in the right way, in the way of those to whom Thou hast been gracious, not of those against whom Thou art incensed, nor of those who go astray."

I then went on to point out that the *Sunnis*, or followers of the Prophet's traditions, recognize as great exponents of the orthodox doctrines four principal *Imáms* or founders of the schools of juris-

(1) I. L. R., 7 All., 461.

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prudence, namely *Abu Hanifa*, *Shafai*, *Málik*, and *Hanbal*, all of whom flourished within the first two centuries of the Muhammadan era, and whose doctrines have been accepted by the bulk of the Muhammadan population of the world.

The doctrines of these *Imáms* proceed upon the same principles, and the differences of opinion are limited only to matters of detail, such as the form or manner of the performance of religious rituals.

In the case of *Queen-Empress* v. *Ramzan* (1) (see p. 471) I held, what I hold now, that it is an indisputable matter of the Muhammadan ecclesiastical law that the word '*ámín*' should be pronounced in prayers after the *Sura-i-Fáteha* or the first chapter of the *Kurán*, and that the only difference of opinion among the four *Imáms* is, whether it should be pronounced aloud or in a low voice. The *Hedaya*, which is the most celebrated text-book of the Hanafi school of law, lays down the rule in the following terms:—

"When the *Imám* (leader in prayers) has said 'nor of those who go astray,' he should say "*ámín*," and so should those who are following him in the prayers, because the Prophet has said that when the *Imám* says '*ámín*' you must say '*ámín*' too. But this saying of the Prophet does not support *Málik* as to the distinction (between saying '*ámín*' aloud and saying it in a low voice) because the Prophet after saying 'when the *Imám* says—*nor of those who go astray*—you should say '*amín*,' also added that the *Imám* should pronounce it, and they (*i.e.*, followers in the prayers) should repeat it inaudibly. Such is the tradition which has been related by *Ibn-i-Masud*; and, moreover, the word is a prayer, and should therefore be pronounced in a low voice." *

* إذا قال الامام ولا الضالين قال آمين و يقولها الموتم لقوله ع إذا امن الامام فامنو اولا متمسك لمالک في قوله ع إذا قال الامام ولا الضالين فقولوا آمين من حيث التسمته لانه قال في آخره فان الامام يقولها و يخفونها لما رونيا من حديث إبن مسعود و لانه دعاء فيكون ميناه على الاخفاء (هدايه جلد اول)

(1) I. L. R., 7 All., 461.

That this doctrine is the result of weighing the authority of conflicting traditions is apparent from the commentary of *Ibn-i-Humám*, a celebrated author of the *Hanafi* school, on the passage of the *Hedaya* which I have quoted above, and I wish to quote the commentary also in order to show the manner in which such questions are dealt with in the Muhammadan ecclesiastical law. The commentary runs as follows :—

"He (author of the *Hedaya)* says that the followers in the prayer should also say it *(i.e., ámín)*: this doctrine is common to prayers which are repeated aloud and prayers which are repeated in a low voice when audible; but as to the latter class of prayers some have maintained that it *(ámín)* should not be said, since loudness of voice is not applicable to them."*

The commentator then mentions the names of various traditionists who have differed as to whether the word *ámín* should be pronounced aloud, and finally points out that the author of the *Hedaya* has only preferred the tradition as to its being pronounced in a low voice. He does not, however, say that the other traditions are untrustworthy or should be absolutely rejected. Indeed he could not say so, as these traditions are to be found in the most authoritative and celebrated collections of traditions *(Siha)* of *Bukhari* and *Muslim*, both equally acknowledged as accurate traditionists by all the schools of *Sunni* Muhammadans. The former of these in the chapter relating to the pronouncing of *ámín* has the following :—

"*Ata* has said that *ámín* is a prayer, and it was pronounced by *Ibn-i-zubair* and those who were behind him (in prayers), so much so that the mosque resounded. *Abu Huraira* used to ask the *Imám* aloud not to forsake him in pronouncing '*ámín*.' *Nafe* has said that *Ibn-i-Umar* never omitted '*ámín*;' and used to induce

* قوله يقولها الموتم هذا اعم من كونه في السرية إذا سمعه اوفي الجهرية و في السرية منهم من قال لالان الجهر لاعبرته به (إبن حمام حاشيه هدايه جلد اول)

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others to say it, and that he had heard favourably about it from him as to its being beneficial." (1)

Sahib Muslim has the following tradition in regard to saying *ámín* :—

"*Harmala bin Yahya* related to us that it was related to him by *Ibn-i-Wahab*, who said that he had been informed by *Amru*, that he had been told by *Abu Yunus*, who had heard from *Abu Huraira*, that the Prophet has said : 'Whenever any one among you says '*ámín*' in prayers whilst the angels in heaven are saying it, and the two coincide with each other, then his past sins will be forgiven.' "—(2)

This passage of *Sahib Muslim* is fully explained in his celebrated commentary of *Nawawi*, which deserves quotation here, as it explains exactly how the Muhammadan ecclesiastical law stands as to the pronouncing of *ámín* in prayers :—

"In these traditions *(hadis)* is enjoined the pronouncing of '*ámín*' after the *Sura-i-Fáteha* (first chapter of the *Kurán)* both for the leader in prayer as well as those who follow him and also for him who may be praying singly. It is proper that the pronouncing of '*ámín*' by the followers should be simultaneous with that of the leader in prayer, that is, neither before nor after, because the Prophet has said :—'When he *(Imám)* says—*nor of those who go astray*—you should say '*ámín*." By saying when the *Imám* says '*ámín*' you should also say it, is meant when he is

(1) باب جهر الامام بالتامين قال عطاء آمين دعاء امن ابن الزبير و من وراءه حتى ان للمسجد لتحية و كان ابوهريرة ينادي الامام لاتفتني بآمين و قال نافع كان ابن عمر لا يدعة و يحثهم و سمعت منه في ذلك خيرا (صحيح بخاري)

(2) حدثني حرملة بن يحيى قال حدثنى ابن وهب قال اخبرنى عمرو ان ابا يونس حدثه عن ابي هريرة ان رسول الله ص قال اذا قال احدكم في الصلواة آمين والملئكته في السماء آمين فوافق احديها الاخرى غفر له ما تقدم من ذنبه

(صحيح مسلم جلد اول)

about to say it. It is the *Sunna* or the Prophet's precept both for the *Imám* and the person praying singly to say '*ámín*' loud, and the same applies to the follower in prayer according to the correct doctrine. This is an explanation of our doctrine; and there is a general consensus of opinion among the faithful that for the person praying singly, as well as for the *Imám* and the followers in prayers which are repeated in a low voice, the word '*ámín*' should be pronounced; and a vast number have maintained that the same is the rule for prayers which are repeated aloud. There is a statement of the opinion of *Málik* that the *Imám* should not say '*ámín*' in prayers which are repeated aloud. *Abu Hanifa* and the *Kufis* and *Málik* in one of his statements of opinion maintain that '*ámín*' should not be pronounced aloud; but there is a vast number who hold that it should be pronounced in a loud voice."*

This commentary on the *Sahih Muslim* is according to the *Shá-fai* school; but none the less is it considered orthodox and authoritative by all *Sunni* Muhammadans, which the parties to this suit are. The defendants state themselves as belonging to the *Hanafi* school, and it is only upon this ground that they obstruct the plaintiffs from worshipping in the mosque.

It is therefore necessary to consider whether they have any real or just cause of complaint against the plaintiffs. Upon this point I may repeat what I said in *Queen-Empress* v. *Ramzan*, (1) as the

* في هذه الاحاديث استحباب التامين عقب الفاتحة للامام والماموم والمنفرد و انه ينبغي ان يكون تامين الماموم مع تامين الامام لا قبله ولا بعده بقوله ص اذا قال ولا الضالين فقولوا آمين و اما روايته اذا امن فامنوا فمعناها اذا اراد التامين و يسن للامام والمنفرد الجهر بالتامين و كذا للماموم على المذهب الصحيح هذا تحصيل من هنا و قد اجتمعت الامة على ان المنفرد يومن و كذلك الامام والماموم في الصلوات السرية و كذلك قال الجمهور في الجهرية و قال مالك في روايته لا يومن الامام في الجهرية و قال ابو حنيفة والكوفيون و مالك في روايته لا يجهر بالتامين و قال الاكثرون يجهر (نووى شرح مسلم جلد اول)

(1) I. L. R., 7 All., 461.

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observations which I then made are equally applicable to the circumstances of the present case. In that case I said :—

"The prosecutor states himself and the founder of the mosque to be *Hanafis*, that is the followers of *Imám Abu Hanifa's* doctrines. One of the highest authorities of that school is the *Durr-i-Mukhtar*, in which the strongest text is to be found against saying '*ámín*' aloud ; but the text itself falls far short of substantiating the rule of ecclesiastical law, upon establishing which the case for the prosecution in my opinion depends. The text is as follows : 'It is in accord with the practice of the Prophet to say '*ámín*' in a low voice, but the departure from such practice does not necessitate invalidity (of the prayer), nor a mistake, but it is only a detriment.' * Even this passage only relates to the efficacy or validity of the prayer of the person who says '*ámín*' aloud or in a low tone. There is absolutely no authority in the *Hanafia* or any other of the three orthodox schools of Muhammadan ecclesiastical law, which goes to maintain the proposition that if any person in the congregation says the word '*ámín*' aloud at the end of the *Sura-i-Fáteha*, utterance of the word causes smallest injury, in the religious sense, to the prayers of any other person in the congregation, who, according to his tenets, does not say that word aloud. It is a matter of notoriety that in all the Muhammadan countries like Turkey, Egypt and Arabia itself, *Hanafis* and *Shafais* go to the same mosque, and form members of the same congregation, and, whilst the *Hanafis* say the word '*ámín*' in a low voice, the *Shafais* pronounce it aloud. To say that the utterance of the word '*ámín*' aloud, after the *Imám* has recited the *Sura-i-Fáteha*, causes the disturbance in the prayers of a congregation, some or many of whom say the word in a low tone, is to contradict the express provisions of the Muhammadan ecclesiastical law as explained by all the four orthodox *Imáms*. I now pass to the next step in the case, namely, whether the accused in this case had the legal right to

* سنها التامين سرًا ترک السنة لا يوجب فسادا ولا سهوا بل اساءته —
(در مختار)

enter into and worship in the mosque with the congregation according to their own tenets. There is absolutely no evidence in the case to substantiate the accusation brought by the prosecutor against them that they are 'no longer Muhammadans.' They call themselves 'Muhammadi,' which is the Arabic for 'Muhammadan,' and although the prosecutor brands them as '*Wahábis*,' there is nothing to prove that they belong to any heterodox sect. Indeed, the only tangible ground upon which the prosecutor objects to their worshipping in the mosque, and calls them '*Wahábis*,' is their saying the '*ámín*' aloud, a practice which, as I said before, is commended by three out of the four orthodox *Imáms* of the *Sunni* persuasion and which, according to the doctrine of *Imám Abu Hanifa* himself, does not vitiate the prayers. Now, it is the fundamental principle of the Muhammadan law of *wakf*, too well known to require the citation of authorities, that when a mosque is built and consecrated by public worship, it ceases to be the property of the builder and vests in God (to use the language of the *Hedaya)* 'in such a manner as subjects it to the rules of Divine property, whence the appropriator's right in it is extinguished, and it becomes a property of God by the advantage of it resulting to his creatures.' A mosque once so consecrated cannot in any case revert to the founder, and every Muhammadan has the legal right to enter it, and perform devotions according to his own tenets, so long as the form of worship is in accord with the recognized rules of Muhammadan ecclesiastical law. The defendants therefore were fully justified by law in entering the mosque in question and in joining the congregation, and they were strictly within their legal rights, according to the orthodox rule of the Muhammadan ecclesiastical law, in saying the word '*ámín*' aloud."

Viewing the authorities which I have quoted and referred to, I have no doubt that under the Muhammadan law of *wakf*, and the Muhammadan ecclesiastical law, which we are bound to administer in such cases under s. 24 of the Civil Courts Act (VI of 1871), the provisions of which have been reproduced in s. 37 of Act XII of 1887, a mosque when public is not the property of any

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particular individual or even a body or corporation or any other human organization which in law has a personality. In the eye of the Muhammadan law a mosque is the property of God, it must be recognized as such, and subject only to such limitations as the Muhammadan ecclesiastical law itself provides, it is public property, being the property of God for the use of his servants, and every human being is entitled to go and worship there so long as he conforms to the rules of the Muhammadan ecclesiastical ritual of worship.

This being so, the plaintiffs in this case, who are obviously Muhammadans, and as to whom even Pandit *Sundar Lal*, for the appellants, has foregone the contention that they are not *Musalmans*, have a right to enter the mosque and to use it for Divine worship and to say the word '*ámín*' aloud or in a low voice in their prayers, since the Muhammadan ecclesiastical law permits them to have their choice as to the tone of voice in which the word is to be pronounced.

I am anxious to point out that the question as to the exact vocal scale or notes of the octave of the human voice is nowhere dealt with in the Muhammadan law of ecclesiastical ritual, and Pandit *Sundar Lal* for the appellants has conceded that no definition or statement in this respect is to be found in the sacred traditions *Hadis* or authoritative legal texts, and it follows that the matter must necessarily be left to the ear of the person who pronounces the word '*ámín*' aloud, and the powers of hearing which those who may be close or at a distance from him may happen to possess.

There is, however, as the learned Chief Justice has mentioned, a statement in the judgment of the Court of first instance, to the effect that the decree which was to follow upon that judgment was a decree requiring that the plaintiffs should pronounce the word '*ámín*' loudly, but not at the top of their voices, nor in such a manner as to trouble the ears of the fellow-worshippers in the congregation. But this is a matter which depends upon the powers of hearing possessed by the fellow-worshippers, and cannot form the subject of a restriction or limitation of the right decreed.

This being so, I expected that some argument would be addressed to us in opposition to what I said in the case of *Queen-Empress* versus *Ramzan* (1), that according to the tenets of *Imám Azam*, that is, *Imám Abu Hanifa* himself, there is no such rule in the Muhammadan ecclesiastical law as would render it illegal to pronounce the word '*ámín*' at the top of the voice or in any other note in the octave of the human voice. I was anxious to hear some such argument, because if it were true that according to the doctrines of *Imám Abu Hanifa* the pronouncing of the word '*ámín*' in a voice audible to any of the fellow-worshippers is a matter which, in the spiritual or religious sense, not only vitiates the prayers of the person who pronounces it aloud, but also of those who hear it, I should have been inclined to hold that some such limited decree should be passed as that passed by the Court of first instance. But, as I have shown, no such limitations as to the tone or note of the voice are required by the Muhammadan ecclesiastical law of ritual, and I am glad to find that this view recommends itself to the approval of the learned Chief Justice and my learned brethren.

I only wish to add that, on the opening of the case, I felt that it might possibly be a difficult question whether the action was maintainable or not; but Pandit *Sundar Lal*, on behalf of the appellants, has expressly relinquished all arguments upon the point, and I think that he was right in doing so.

I agree with the learned Chief Justice in passing the decree which he has pronounced.

Appeal dismissed.

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(1) I. L. R., 7 All., 461.

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July 25.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, Mr. Justice Mahmood and Mr. Justice Knox.

MATA DIN KASODHAN (PLAINTIFF) *v.* KAZIM HUSAIN AND ANOTHER (DEFENDANTS).*

Mortgage—Rights of prior and subsequent incumbrancers inter se—*Rights of mortgagee purchasing equity of redemption—Right of sale of mortgaged property—Suit to bring mortgaged property to sale, who necessary parties to—"Property," meaning of the term in Act IV of* 1882—*Act IV of* 1882 (*Transfer of Property Act*) *ss.* 3, *and* 6, *Chap. IV* passim—*Act I of* 1868 (*General Clauses Act*) *s.* 2, *cls.* (5) *and* (6).

A and B jointly mortgaged certain immovable property to X by a simple mortgage deed on the 10th September 1882. They again mortgaged the same property to X on the 23rd February 1884. On the 6th August 1885, A mortgaged a portion of the said property to Y. On the 12th August 1885, B mortgaged a portion of the same property to X. On the 21st August 1885, A mortgaged a portion of the same property to Z. On the 20th September 1886, A and B sold to X the property mortgaged to him and with the proceeds of that sale X's three mortgages were paid off. On the 8th January 1887, Y sued A, B and X for cancelment of the deed of sale of the 20th September 1886, and for sale of the property mortgaged to him under his deed of the 6th August 1885. Y did not make Z a party to this suit. He did not ask for redemption of X's mortgages nor for foreclosure of Z's mortgage.

Upon these facts it was *held* by EDGE, C. J., STRAIGHT, TYRRELL and KNOX, J. J.:—MAHMOOD, J. *dissentiente.*

(1) That X not having exhibited any intention of foregoing altogether his rights in respect of the mortgages of the 10th September 1882 and the 23rd February 1884, was entitled to keep those securities alive and to use them as a shield against the claim of Y, the subsequent mortgagee, to the extent of the amount which was due under them on the 20th September 1886. *Gokuldoss Gopaldoss* v. *Rambux Sheochand* (1); *Gaya Prasad* v. *Salik Prasad* (2); *Mul Chand Kuber* v. *Lallu Trikam* (3); *Shantapa* v. *Balapa* (4); *Ramu Naikan* v. *Subbaraya Mudali* (5); *Sirbadh Rai* v. *Roghunath Prasad* (6); *Janki Prasad* v. *Sri Matra Mautangui Debia* (7); and *Gangadhara* v. *Sivarama* (8) referred to.

(2) That Y as subsequent mortgagee could not bring to sale under his mortgage-deed the property mortgaged to him without first redeeming X's two prior mortgages.

* Second appeal No. 1210 of 1888, from a decree of W. R. Burkitt, Esq., District Judge of Gorakhpur, dated the 30th May 1888, confirming a decree of Maulvi Ahmadullah Khan, Subordinate Judge of Gorakhpur, dated the 24th August 1887.

(1) L. R. 11. I. A. 126. s. c., I. L. R., 10 Calc., 1035.
(2) I. L. R., 3 All., 682.
(3) I. L. R., 6 Bom., 404.
(4) I. L. R., 6 Bom., 561.
(5) 7 Mad. H. C. Rep., 229.
(6) I. L. R., 7 All., 568.
(7) I. L. R., 7 All., 577.
(8) I. L. R., 8 Mad., 246.

Syud Wajed Hossein v. *Hafez Ahmed Rezah* (1); *Khub Chand* v. *Kalian Das* (2); *Kasum-un nisa Bibi* v. *Nilratna Bose* (3); *Har Prasad* v. *Bhagwan Das* (4); *Muhammad Ibrahim* v. *Tek Chand* (5); *Ali Hasan* v. *Dhirja* (6); *Zalim Gir* v. *Ram Charan Singh* (7) and *Unes Chunder Sircar* v *Zahur Fatima* (8) referred to, in addition to the cases cited above. *Raghunath Prasad* v. *Jurawan Rai* (9) distinguished. *Vencata Chella Kandian* v. *Panjunadien* (10) *Gangadhara* v. *Sivarama* (11) and the judgments of Mahmood J. in *Sirbadh Rai* v. *Raghunath Prasad* (12) and in *Janki Prasad* v. *Sri Matra Mautangui Debia* (13) dissented from.

(3) That Z's mortgage of the 21st August 1885 having been registered, Y must be taken to have had notice of it, and, having had notice thereof, was bound to make Z a party to the suit for sale under his (Y's) mortgage.

Damodar Dev Chand v. *Naro Mahadev Kelkar* (14) and *Dullabhdas Dev C.and* v. *Lakshmandas Sarup Chand* (15) referred to.

(4) That the term "property" as used in Chapter IV of Act IV of 1882 means an actual physical object and does not include mere rights relating to physical objects.

Held by the FULL BENCH.

That the Transfer of Property Act (Act IV of 1882), so far as the question of reliefs and procedure is concerned, applies to mortgages executed before the coming into force of the Act. *Ganga Sahai* v. *Kishen Sahai* (16); and *Bhobo Sundari Debi* v. *Rakhal Chunder Bose* (17) referred to.

MAHMOOD, J., *contra*.—

Inasmuch as a mortgagee cannot bring the mortgaged property to sale without the intervention of a Court, a private purchase by the mortgagee of the rights remaining to the mortgagor in such property, though it may be valid as against the mortgagor, can have no effect in defeating the rights of puisne and mesne incumbrancers. Moreover, where a second mortgage to a third party intervenes between the mortgage to and the purchase by the prior mortgagee of the rights of the mortgagor, such intermediate mortgage prevents the merger of the rights of the prior mortgagee as such with those which he might acquire by his purchase.

The right of sale is an essential incident of a simple mortgage, and inheres as well in puisne and mesne as in prior mortgagees subject to the rights of the prior mortgagees. The puisne or mesne mortgagee is not bound by the terms of the prior mortgage, or mortgages, but is entitled to bring the property mortgaged to sale subject to such prior mortgage or mortgages.

(1) 17 W. R., C. R, 480.
(2) I. L. R., 1 All, 240.
(3) I. L. R, 8 Calc, 79.
(4) I. L. R., 4 All, 196.
(5) Weekly Notes 1882, pp. 59.
(6) I. L. R, 4 All, 518.
(7) I. L. R., 10 All, 629.
(8) L. R. 17IA 201, s. c, I. L. R. 18 Calc. 164.
(9) I. L. R., 8 All., 105.
(10) I. L. R, 4 Mad, 213.
(11) I. L. R., 8 Mad, 246.
(12) I. L. R, 7 All, 568.
(13) I. L. R., 7 All, 577.
(14) I. L. R, 6 Bom, 11.
(15) I. L. R., 10 Bom, 88.
(16) I. L. R., 6 All., 262.
(17) I. L. R, 12 Calc, 583.

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The provisions of s. 85 of Act IV of 1882 are not absolutely imperative, and though thereunder a subsequent incumbrancer ought to be made a party to a suit by a prior mortgagee on his mortgage, the non-joinder of such subsequent incumbrancer is not a fatal defect in the suit. Registration of a subsequent mortgage is not necessarily any notice to a prior mortgagee of the existence of such subsequent mortgage; it being no part of a mortgagee's duty to be on the watch for incumbrances subsequent to his own.

The term "property" throughout Act IV of 1882 is used in its most generic sense and will include the right known as an "equity of redemption."

The facts of this case are fully stated in the judgment of Mahmood, J.

Mr. *C. Dillon*, Munshi *Jwala Prasad* and Babu *Jogindro Nath Chaudhri* for the appellant.

Pandit *Sundar Lal* for the respondent Hari Prasad. The other respondent was not represented.

The following judgments were delivered by the Full Bench :—

EDGE, C. J.—This is a Second Appeal, and is brought by the plaintiff in the suit from the decree of the late District Judge of Gorakhpur of the 30th of May 1888, which dismissed the plaintiff's appeal below, and confirmed the decree of the Subordinate Judge of Gorakhpur dismissing the plaintiff's suit so far as it related to his prayer for a decree for sale of a 4-anna share in mauza Barwa Kutwa in enforcement of an hypothecation lien.

On the 10th of September 1882, two brothers, named Kazim Hasan and Nadir Hasan, in consideration of Rs. 2,901 advanced to them by Hari Prasad, one of the defendants-respondents before us, executed a simple mortgage in his favor, and thereby hypothecated an 8-anna share in mauza Barwa Kutwa and a 5-anna share in mauza Biswa Kutiya.

On the 23rd of February 1884, Hari Prasad advanced a further sum of Rs. 2,799 to Kazim Hasan and Nadir Hasan, and in consideration of that advance they on that date executed a simple mortgage in favor of Hari Prasad, by which they hypothecated the same 8-annas share in mauza Barwa Kotwa and 4 annas of the 5-annas share of Biswa Kutiya hypothecated by the deed of the 10th of September 1882, and in addition certain shares in Mauzas Cap-

tainganj, Rudhauli, Jamgal, Banki, Purasrampur and Bharpurwa.

On the 6th of August 1885, Kazim Hasan borrowed Rs. 1,000 from Mata Din Kasodhan, who is the plaintiff-appellant, and on that day, and in consideration of that advance, Kazim Hasan executed in favor of the plaintiff-appellant a simple mortgage, hypothecating his 4 annas of the 8 annas of Barwa Kutwa, 2 annas of Biswa Kutiya, and some small shares in Captainganj and Bharpurwa.

On the 12th of August 1885, Nadir Hasan borrowed Rs. 1,999 from Hari Prasad, and in consideration of that advance executed on that date a deed in favor of Hari Prasad, by which he hypothecated his 4 annas of the 8-annas share in Barwa Kutwa, and 2½-annas share in Biswa Kutiya, and certain shares in Captainganj and Bharpurwa.

On the 21st of August 1885, Kazim Hasan borrowed Rs. 999 from Mata Prasad, and in consideration of that advance executed a simple mortgage in favor of Mata Prasad, by which he hypothecated his 4 annas of the 8-annas share in Barwa Kutwa, 2 annas in Biswa Kutiya and certain shares in Captainganj and Bharpurwa.

On the 20th of September 1886 Kazim Hasan and Nadir Hasan, by a sale-deed of that date, sold to Hari Prasad the 8-annas share in mauza Barwa Kutwa for Rs. 14,530, and with that sum Hari Prasad's mortgages of the 10th of September 1882, the 23rd of February 1884, and the 12th of August 1885, were paid off. It was to pay off those mortgages that the sale of the 20th of September 1886 was made.

On the 8th of January 1887, Mata Din brought his suit in the Court of the Subordinate Judge of Gorakhpur against Kazim Hasan and Hari Prasad. So far as is material for the consideration of this appeal, he sought by his suit a decree setting aside the sale-deed of the 20th of September 1886, and decreeing a sale of the 4-annas share in Barwa Kutwa in enforcement of his lien under the deed of the 6th of August 1885.

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The plaintiff did not ask for redemption of the mortgages of the 10th of September 1882 and the 23rd of February 1884, nor did he seek foreclosure of the mortgage of the 21st of August 1885.

Kazim Hasan did not defend the suit. Mata Prasad was not made a party to the suit.

The Subordinate Judge dismissed Mata Din's claim to have the sale-deed of the 20th of September 1886 set aside, and to have the 4-annas share in Barwa Kutwa brought to sale.

Mata Din appealed. The District Judge on appeal found that Hari Prasad, when he purchased on the 20th of September 1886, intended to keep alive as shields for his protection the securities of the 10th of September 1882 and the 23rd of February 1884.

The District Judge also found that Mata Din had never tendered payment to Hari Prasad of the amount which had been due under Hari Prasad's prior incumbrances, and had not offered to bring the money into Court, and dismissed the appeal with costs.

The questions which we have to consider in this Second Appeal are what, on the findings of fact of the Lower Appellate Court, are the respective rights of Mata Din and Hari Prasad, and what is the decree which we should pass in appeal in this case.

It has been contended on behalf of Mata Din that Hari Prasad is not entitled to use as shields the mortgages of the 10th of September 1882 and the 23rd of February 1884; that Mata Din was not bound to ask for redemption of either of those mortgages; that Mata Prasad is not a necessary party to the suit; that Mata Din was not bound to seek foreclosure so far as Mata Prasad's mortgage is concerned, and that Mata Din is entitled to a decree for sale of the 4 annas in mauza Barwa Kutwa freed of any incumbrance of Hari Prasad, or at least to a decree for sale of those 4 annas, subject to the mortgages of the 10th of September 1882 and the 23rd February 1884, or to a decree for sale of the rights and interest of Mata Din and Kasim Hasan in those 4 annas.

I hold without the slightest doubt on the authority of *Gokuldoss Gopaldoss*; v. *Rambux Seochand (1)*; *Gaya Prasad* v. *Salik Prasad (2)*; *Mul Chand Kuber* v. *Lallu Trikam (3)*; *Shantapa* v. *Balapa (4)*; *Ramu Naikan* v. *Subbaraya Mudali (5)*; *Sirbadh Rai Raghunath Prasad (6)*; *Janki Prasad* v. *Sri Matra Mautangui Debia (7)*; and *Gangadhara* v. *Sivarama* (8) as applied to the facts found by the Lower Appellate Court in this case, that Hari Prasad is entitled to use the mortgages of the 10th of September 1882 and the 23rd of February 1884 to the extent of the amount which was due under them on the 20th of September 1886 as shields against the plaintiff's claim to bring the 4 annas of mauza Barwa Kutwa to sale. Having regard to the view expressed by their Lordships of the Privy Council in *Umes Chunder Sircar* v. *Zahur Fatima (9)*. I am of opinion that as Hari Prasad has since the 20th of September 1886 been in possession of the 8-annas share of mauza Barwa Kutwa, which he practically took as representing the amounts due under the mortgages of the 10th of September 1882, the 23rd of February 1884, and the 12th of August 1885, the interest which would otherwise be payable under the mortgages of the 10th of September 1882 and the 23rd of February 1884, subsequent to the 20th September 1886, should, if an account be directed to be taken, be treated as satisfied by the rents and profits received by Hari Prasad from the 8 annas of mauza Barwa Kutwa since the 20th of September 1886.

Although all the mortgages in this case were made subsequently to the coming into force on the 1st of July 1882 of the Transfer of Property Act, 1882 (Act IV of 1882), and the rights of the parties are consequently governed by that Act, still as that Act was passed "to define and amend certain parts of the law relating to the Transfer of Property by Act of parties;" and as there has been in the course of the arguments in this case much contention as to

(1) L. R. 11., I. A. 126; s. c. I. L. R, 10 Calc., 1035.
(2) I. L R 3 All., 682.
(3) I. L. R. 6 Bom., 404.
(4) I. L. R. 6, Bom., 561.
(5) 7 Mad. H. C. Rep., 229.
(6) I. L. R 7 All. 568.
(7) I. L. R. 7 All. 577.
(8) I. L. R. 8 Mad., 246.
(9) L. R. 17 I. A. 201; s. c. I. L. R. 18 Calc., 164.

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what, prior to the coming into force of Act IV of 1882, was the law in British India relating to the rights and liabilities of mortgagors, first mortgagees and subsequent mortgagees *inter se*, and as to how far the law in that respect has been defined and amended by Act IV of 1882, I propose before attempting to construe Act IV of 1882 to refer as shortly as possible to such of the decisions of the Courts in India, and of their Lordships of the Privy Council, which I have been able to find as throw any light on the contention of the parties before us. Undoubtedly before the coming into force of Act IV of 1882, and also, as I have had reason to know, since the coming into force of that Act, first mortgagees and also second and susbequent mortgagees have, in suits on their mortgages, obtained decrees for sale of mortgaged or hypothecated immovable property without having redeemed or foreclosed the other mortgages or made the other mortgagees parties to their suits.

Such suits and decrees throw no light upon the questions I propose to consider, except in so far as they were the causes of subsequent litigation as to the rights of mortgagees who were not parties to them.

Most of the decisions which throw any light on the contentions of the parties here have been decisions in suits which were subsequently brought by such decree-holders for declarations that they were entitled to bring the property to sale under such decrees or in suits brought by other mortgagees either against such decree-holders or the purchasers at sales under such decrees for possession, for declarations of their rights as mortgagees, for declarations that such decree-holder could not under such decrees bring the property to sale without giving such other mortgagees an opportunity to redeem or without redeeming their mortgages, as the case might be, or for similar reliefs.

With the exception of *Raghunath Prasad v. Jurawan Rai* (1), to which I shall refer later on, I am not aware of any case in which a second or subsequent mortgagee suing on his mortgage for a decree for sale of the mortgaged property and having made the prior

(1) I. L. R. 8. All., 105.

mortgagee or mortgagees party or parties to his suit obtained on appeal or otherwise from any High Court in India a decree for sale of the mortgaged property or of any interest of his own or of the mortgagor's in it except on his redeeming the prior mortgagee or mortgagees.

I shall now proceed to refer to the cases of which I am aware, taking them, as far as possible, in the order of date of the final decisions. In *Syud Wajed Hossein* v. *Hafez Ahmed Rezah* (1) the plaintiffs sued for possession as purchasers at a sale held in execution of a decree upon a mortgage of the 11th of October 1859. The defendants resisted the suit on the ground that they had on the 15th of May 1868 by bill of sale purchased the property, the consideration of that bill-of-sale having been money advanced by them to pay off mortgages prior in date to that of the 11th of October 1859. In that case Loch and Ainslie, JJ., in 1872, gave the plaintiffs a decree for possession, conditional on their paying to the defendants all sums for principal and interest paid by them on account of the mortgages existing previous to the mortgage of the 11th of October 1859, and remitted the suit to the Court below that the amount so payable to the defendants might be ascertained and embodied in the decree.

In *Ramu Naikan* v. *Subbaraya Mudali*, (2) the plaintiff sued to recover the amount due under a mortgage of 1869 by means of the mortgaged property, as the report says, which I understand to mean that the plaintiff sought a decree for sale on his mortgage. The suit was resisted by the second defendant on the ground that he was a prior mortgagee of the particular lands, and, as such, had a right to have the lands held liable for his debt first. The facts, so far as they are material, appear to have been that the second defendant having obtained a simple money decree on certain mortgage-bonds made between 1861 and 1870, by which the property in question had been hypothecated to him, brought the property to sale under his decree, and purchased it for a sum considerably less than the amount which had been due under his mortgage-bonds. I infer from the report

(1) 17. W. R. C. R., 480. (2) 7. Mad. H. C. Rep. 229.

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that the District Munsif had given the plaintiff a decree for sale, that on appeal the Civil Judge of Chittur had reversed so much of the District Munsif's decree as related to the particular lands, that is, that the Civil Judge had dismissed the plaintiff's suit to that extent, and that on appeal to the High Court of Madras, Holloway, Officiating C. J., and Kindersley, J., in 1873, affirmed the decision of the Civil Judge. In their judgment in that case they are reported to have said that "Dernburg justly observes that the subsequent mortgagee gets all to which he is entitled when he is allowed to redeem the prior mortgage."

That passage shows that those learned Judges were of opinion that a second mortgagee who had not redeemed could not maintain a suit for the sale of the mortgaged property or of any interest in it.

The decision of the Madras High Court in *Ramu Naikan* v. *Subbaraya Mudali* was referred to apparently with approval by their Lordships of the Privy Council in *Gokuldoss Gopaldoss* v. *Rambux Seo Chand* (1). Their Lordships did not suggest that in *Ramu Naikan* v. *Subbaraya Mudali* the Madras High Court had misapplied the principle of the shield.

In *Vencata Chella Kandian* v. *Panjanadien* (2) Turner, C. J., in September 1881, threw some doubts on the correctness of the decision in *Ramu Naikan* v. *Subbaraya Mudali*, and in reference to that decision said that "when a second mortgage is created in favor of a person who is not the holder of the first mortgage, the second mortgagee is entitled to pay off the first mortgage, or to sell the estate subject to the first charge. On the same ground of regard for the interests of all parties that dictates the preservation of the right created by the first charge, I am unable to see why the acquisition by the first mortgagee of the right remaining in the owner deprives the second mortgagee of his right to enforce his charge by a sale of the property subject to the rights of the first mortgagee. If the first mortgagee had not acquired the rights remaining in the

(1) L.R. 11, I.A. 126, (at p. 133.) (2) I.L.R. 4, Mad. 213.

owner it is unquestionable that the second mortgagee would have been entitled to call for a sale of the property subject to the rights of the prior incumbrancer. His right should not be defeated by a transaction to which he is no party. If it had been considered an objection to the preservation of his right that the first mortgagee might subsequently have applied to the Court to order a sale (and I do not think it is, for the purchaser under the second mortgage might redeem the first mortgage and prevent a sale), then a sale should have been ordered of the property to discharge both mortgages, and the proceeds should have been applied to their satisfaction in order of priority; but I believe the course which would have best fulfilled the contracts and secured the rights of the parties would have been to allow a sale subject to the first incumbrance."

The first comment to be made on those observations of Turner, C. J., is that from the point of view from which he regarded the case then before him they were entirely *obiter*. The second comment is that although Turner, C. J., was of opinion that "when a second mortgage is created in favor of a person who is not the holder of the first mortgage, the second mortgagee is entitled to pay off the first mortgage, or to sell the estate subject to the first charge," he does not explain how, if the first mortgage was an usufructuary mortgage with possession, the usufruct to be applied to the discharge of the principal and interest, the second mortgagee could have a right to redeem until the principal and interest had been satisfied by the usufruct, or how, in any other case, a second mortgagee could have a right to redeem a first mortgage the time for the redemption of which, as fixed by the mortgage contract, had not arrived, or, in other words, how a second mortgagee in such cases could by a transaction to which the first mortgagee was no party, have acquired a right as against him which their mortgagor did not possess.

The third comment is that Turner, C. J., referred to no authority in support of his view of the rights of a first and second mortgagee respectively. It would have enabled us to judge of the soundness or otherwise of those *obiter dicta*, if Turner, C. J., has referred to

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the authority, if any, which was present to his mind, or had given some indication as to whether he thought that the views which he was enunciating without any doubt or hesitation were consistent with the principles of law or equity which had before then been applied in India or in England. Those *obiter dicta* are the first judicial suggestions which I have been able to find that the rights of a second mortgagee as against a first mortgagee included a right to bring the mortgaged property or an interest in it to sale without even an offer to redeem the prior mortgage having been made.

In 1876 in the case of *Khub Chand* v. *Kalian Das* (1) Turner, J., had defined the rights as they then appeared to him of a second mortgagee. He is there reported to have said :—"In the case now before the Court the mortgagor, instead of making a transfer of the whole of his interest in the property pledged, aliened it in part by the creation of a subsequent incumbrance in the nature of a conditional mortgage. He thereby conferred on the conditional mortgagee the right to redeem the first mortgage at whatever time it could have been redeemed by the mortgagor, and the right, in the event of default being made in payment of the debt due to him, to foreclose and hold the property subject to the first incumbrance." The first incumbrance in that case was a simple mortgage. It does not appear whether Turner, J., then considered that a right to hold included a right to sell the mortgaged property subject to the first incumbrance.

In *Gaya Prasad* v. *Salik Prasad* (2) Stuart, C. J., Oldfield and Straight, J.J., in April 1881, held that a person who had been prior incumbrancer, and who subsequently to a mortgage of the same property to another person purchased the property intending to keep alive his prior incumbrance as a shield for his protection, could defeat a suit by the puisne incumbrancer to bring the property to sale. Although Pearson, J., dissented in that case, he apparently dissented on the ground that in his opinion the pre-existing lien of the prior incumbrancer had been extinguished by his purchase.

(1) I. L. R. 1 All., 240 (at p. 247).
(2) I. L. R. 3 All., 682.

In *Kasum-un-nissa Bibee* v. *Nilratna Bose* (1) Pontifex and Field, J.J., in May 1881, held that a patnidar should have been made a party to a mortgage suit relating to the property, and gave the patnidar a decree for redemption.

In *Damodar Dev Chand* v. *Naro Mahader Kelkar* (2) Westropp, C. J., and Pinhey, J., in September 1881, held that a second mortgagee was entitled to be made a party to a suit by the first mortgagee on his mortgage, in order that he might have an opportunity of redeeming the first mortgage, and not having been a party to that suit, could not be deprived of that right by proceedings to which he was not a party. In the suit of the first mortgagee a decree for sale had been made, and the property had been sold and purchased *benami* for the first mortgagee. In the suit of the second mortgagee a decree for redemption was made in his favor.

In *Har Prasad* v. *Bhagwan Das* (3) Oldfield and Brodhurst, J.J., in January 1882, followed the decision of the majority of this Court in *Gaya Prasad* v. *Salik Prasad* and held that the person who was entitled to the protection of a prior mortgage was, until his mortgage debt was satisfied, entitled to have a suit by a puisne incumbrancer to bring the mortgaged property to sale dismissed.

In *Muhammad Ibrahim* v. *Tek Chand* (4) Stuart, C. J., and Oldfield, J., in March 1882, following *Gaya Prasad* v. *Salik Prasad*, dismissed a suit for sale brought by a puisne incumbrancer against a prior mortgagee.

In *Mul Chand Kuber* v. *Lallu Trikam* (5), the facts were that a house was mortgaged to the father of the defendant, was subsequently mortgaged by the same mortgagor to the plaintiff, and was still later purchased from the mortgagor by the father of the defendant, who in purchasing intended to keep his mortgage alive as a shield for the protection of his interest. The plaintiff having obtained a decree upon his mortgage attached the property. The attachment was successfully resisted by the defendant. Upon which

(1) I. L. R. 8 Calc., 79.
(2) I. L. R. 6 Bom., 11.
(3) I. L. R. 4 All., 196.
(4) Weekly Notes, 1882 p. 59.
(5) I. L. R. 6 Bom., 404.

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the plaintiff brought a suit to establish his right to levy, by sale of the house, the amount due under his mortgage. Melvill, West and Pinhey, J.J., in March 1882, held that the defendant might properly require the redemption of his mortgage as the condition of the plaintiff's enforcing his decree upon his mortgage against the property. That case had been referred to the Full Bench by Westropp, C. J., and Nanabhai Hari Das, J. By their referring order it appears that they were of opinion that the fair course was to permit the plaintiff to redeem the defendant's mortgage.

In *Shantapa* v. *Balapa*, (1) Melvill and Pinhey, J.J., followed the decision in *Mul Chand Kuber* v. *Lallu Trikam*.

In *Ali Hasan* v. *Dhirja* (2) an usufructuary mortgage of a 2-annas 6-pies share was in 1874 made to the plaintiff who was put in possession. In 1875 a portion of the same property was again mortgaged to the plaintiff. In July 1877, the 2-annas 6-pies share less 2 pies was mortgaged to one Niamat, who took with notice of the previous incumbrances. In October 1877 the 2-annas 4-pies share, which had, in July 1877, been mortgaged to Niamat, was again mortgaged to the plaintiff. In September 1879, Niamat obtained a decree for sale of the 2-annas 4-pies share in enforcement of his lien under his mortgage of July 1877. The plaintiff was not a party to that suit. On the 2nd of October 1879, the plaintiff purchased from one of the mortgagors—what had become of the other mortgagor I do not know—2-annas of the 2-annas 6-pies share mortgaged to him in 1874. Part of the consideration for that purchase was the principal and interest due under the mortgages of 1874 and 1875. On the 20th of November 1880, the defendants at an auction sale, held under Niamat's decree, purchased the 2-annas 4-pies share. Thereupon the plaintiff brought his suit for a declaration that he was entitled to the proprietary right in, and possession of, the 2-annas share purchased by him. The above are the facts, so far as they are material, on the question before us. In June 1882, Tyrrell and Mahmood, J.J., held that the plaintiff was entitled to insist upon his prior charges being

(1) I. L. R. 6 Bom., 561. (2) I. L. R. 4 All., 518.

paid off before the defendants could either oust him or be entitled to absolute proprietary right in the property. At page 529 of the Report, Mahmood, J., is reported to have said "under this view, which in my judgment is consistent with the opinion of the Full Bench of this Court in *Gaya Prasad* v. *Salik Prasad*, I hold that all that the plaintiff was entitled to in this litigation was a declaration that as holder of the prior mortgages of 7th July 1871 and 17th July 1875, respectively, he is entitled to continue in possession by virtue of his said liens; that the rights purchased by the defendants-appellants are subject to these liens, and cannot be enforced as against the plaintiff till full payment of the moneys due to him under the mortgage-deeds abovementioned."

In *Parsi* v. *Girand Singh* (1) the plaintiffs in 1879 had purchased property over which they had held mortgages of the 28th of February 1876 and the 23rd of February 1877, part of the consideration for the purchase being set off against the money due under their two mortgages. On the 13th of May 1877 the mortgagor mortgaged the property to the defendant. In 1880 the defendant sued the mortgagor alone to enforce his hypothecation by sale of the property, and on the 11th of August of that year obtained a decree. On the defendant applying for attachment and sale the plaintiffs objected. Their objection was disallowed, and they brought their suit to have the attachment removed. Oldfield and Tyrrell, J.J., in April 1885, held that the plaintiffs by purchasing the property on which they had a prior charge had not lost the benefit of their charge, and that they were entitled to resist the sale of the property by the defendant, subsequent mortgagee, until their prior charge was satisfied. The amount of that prior charge had been ascertained to be Rs. 1,296-6-7, and those learned Judges decreed that the defendant could only bring the property or any part of it to sale on first paying to the plaintiff that sum.

In *Gangadhara* v. *Sivarama* (2) the plaintiff in February 1878, in a suit against Sivarama Mudali, obtained a decree on a compro-

(1) Weekly Notes, 1885 p. 155. (2). I. L. R. 8 Mad, 246.

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mise providing for payment of the judgment-debt and declaring certain lands, five plots, hypothecated as security for the payment in accordance with the terms arranged. That decree was registered. Of those lands plots Nos. 1, 2 and 3 had been mortgaged in 1866 by Sivarama Mudali to Pushpavanalingam Mudali, who, in October 1877, obtained a decree for the enforcement of his mortgage. On the 23rd of May 1878 Sivarama Mudali borrowed Rs 3,500 from the defendants Nos. 2, 3 and 4, and mortgaged to them the five plots of land. Of that sum Rs. 1,900 were paid to Pushpavanalingam Mudali, who, in consideration of that payment, released his lien on plots Nos. 1, 2 and 3. The plaintiff subsequently attached plots Nos. 1, 2 and 3 under his decree of February 1878; but on the objections filed by the defendants Nos. 2, 3 and 4, the properties were released from attachment, and thereupon the plaintiff brought his suit to have it declared that plots Nos. 1, 2 and 3 were liable to be sold in execution of his decree of February 1878, free from the incumbrance held by the defendants Nos. 2, 3 and 4. Turner, C. J., and Muttusami Ayyar, J., in 1884, holding that the plaintiff was entitled to sell plots Nos. 1, 2 and 3 under his decree of February 1878, made a declaration that such sale must be made subject to the lien of the defendants Nos. 2, 3 and 4 for the Rs. 1,900 paid to Pushpavanalingam Mudali.

In *Sirbadh Rai* v. *Raghunath Prasad* (1) Jurawan Singh and Daulat Kuar in 1866 mortgaged by an usufructuary mortgage three bighas of land to one Lachman Rai, and in 1874 mortgaged their 4-annas share, which included the three bighas, to the plaintiff. In 1878 the mortgagors for the purpose of paying off the mortgage of 1866, executed in favor of the defendants a deed of sale of the three bighas of land. Part of the purchase-money was applied to paying off the mortgage of 1866. The plaintiff in November 1882 brought his suit to bring the 4-annas share to sale by enforcement of his lin under his mortgage of 1874. That case came before a Division Bench of this Court in March 1885, when Oldfield, J., held that the mortgage of 1866 had not been extinguished, and that it afforded

(1). I. L. R. 7 All. 568.

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a defence to the plaintiff's suit to bring the three bighas to sale. Mahmood, J., held that the defendants were entitled to the benefits of the mortgage of 1866, which they had paid off. He was, however, of opinion that the plaintiff was entitled to bring the three bighas to sale, but that such sale would be subject to the mortgage of 1866, to the benefit of which the defendants were entitled. The case went on appeal before the Full Bench of this Court in January 1886,* (*Raghunath Prasad* v. *Jurawan Rai*) at which time Mahmood, J., was not a member of the Court. The three bighas had been referred to in the proceedings in the Courts below as "land No. 111." The Munsif had decreed that "land No. 111 be exempted from the hypothecation lien." That decree was varied by the Full Bench in June 1886, by adding the words "in that property the interest of the plaintiff as second mortgagee only to be sold." That form of variation was proposed by Petheram, C. J., and was agreed to by Straight, Oldfield, Brodhurst and Tyrrell, J.J.

It is to be observed that the mortgage of 1866 was an usufructuary mortgage with possession, which, if it inured with all its benefits to the defendants, was one which the plaintiff when he brought his suit was not entitled to redeem. Under such circumstances it would be difficult to see what interest, if any, in the three bighas the plaintiff could sell beyond the right to possession on the determination of the mortgage of 1866 by the principal and interest being satisfied by the usufruct.

The effect of the decree of the Full Bench was to deprive the plaintiff of a lien on the three bighas if he ever had one. No authorities were referred to in any of the judgments in the Full Bench. It does not appear whether the fact that the mortgage of 1866 was an usufructuary mortgage with possession distinguished, in the opinion of the Full Bench, that case from one in which the prior incumbrance was a simple mortgage ripe for redemption. Indeed it seems to me very doubtful whether the case was argued at all before the Full Bench, it having been assumed that the difference

* I. L. R. 8 All., 105.

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of opinion between Oldfield, J., and Mahmood, J., had arisen from some misapprehension as to the facts of the case.

In the case of *Janki Prasad* v. *Sri Matra Mautangni Debia* (1) the facts, so far as they are material, were that in 1872 Ungan and others by deed mortgaged certain property to the plaintiff. That deed was not registered, nor did it require to be registered under the Registration Act applicable to it. The mortgagors in 1880 executed another deed of mortgage in respect of the same property in favor of one Sundar Lal. That deed was registered. The mortgagors executed in 1881 another deed of mortgage in favor of Sundar Lal over the same property. That deed was not registered, nor did it require registration. In a suit on the deed of 1881 Sundar Lal got a decree, and under that decree Sundar Lal had the property attached and sold. It was purchased by the defendant Janki Das, who subsequently paid off the registered mortgage of 1880, and received the mortgage-deed of that date. The plaintiff subsequently brought his suit to recover by sale of the property the money due to him under his mortgage of 1872, and made Janki Das and the mortgagors defendants. That suit came in appeal before Oldfield and Mahmood, J., in March 1885. In the opinion of Oldfield, J., the question turned on the priority of the registered over the unregistered mortgage, and holding that there was such priority, he held that the suit should be dismissed. Mahmood, J., also held that the registered mortgage took priority over the unregistered mortgage, and that Janki Das having paid off the registered mortgage, was entitled to the benefits of it; but he held that the plaintiff was entitled to have the property sold under his unregistered mortgage of 1872 subject to the rights of priority which Janki Das had acquired by reason of his having paid off the registered mortgage of 1880.

In *Dullabhdas Devchand* v. *Lakshmandas Sarup Chand* (2), in which the plaintiff sued to recover possession of land, the facts were as follows:—In 1870 Sambhu and his two sons mortgaged the lands in question to Har Lal without possession. In 1871 the

(1) 1. L. R., 7 All., 577. (1) I. L. R., 10 Bom., 88.

mortgagors mortgaged the lands without possession to the defendant On the 10th of June 1873 the mortgagors mortgaged the lands again to Har Lal. That mortgage purported to give Har Lal possession, and to have been given as security for the principal and interest due under the mortgage of 1870, the interest then due being treated as principal, and for interest. On the 12th of June 1873 the mortgagors again mortgaged the lands to the defendant. The mortgage-deed purported to give possession to the defendant. The consideration for that mortgage of the 12th June 1873 was the principal and interest due under the mortgage of 1871, the interest then due being converted into principal. In 1877 Har Lal obtained a decree for sale upon his mortgage of the 10th of June 1873. The defendant was not a party to that decree. At the sale held under that decree the plaintiff purchased, and, having in his attempt to obtain possession of the lands been obstructed by the defendant, contended that he was entitled to possession as he was not a party to Har Lal's decree, and offered to pay the plaintiff the amount of his purchase money or to vacate the lands on satisfaction of his own mortgage lien. In August 1885 Sargent, C. J., and Birdwood, J., being of opinion that there was nothing to show an intention to forego the benefit of the security created by the mortgage-deed of 1870, held that the decree of 1877 conferred an absolute title on the purchaser (the plaintiff) at the auction sale, free from all incumbrances created by the mortgagors subsequent to the mortgage of 1870; but that the defendant not having been made a party to Har Lal's suit had not lost his right of redemption, which was still open; and although the plaintiff's suit was not one for foreclosure, they decreed that "the defendant do deliver possession to the plaintiff, but that he be at liberty to redeem by payment to the plaintiff, within six months, of the amount which would be due on the mortgage of the 15th July 1870, if the same had remained unaffected by the mortgage of 1873, or, in default, should remain for ever foreclosed. The defendant to pay plaintiff his costs throughout."

That is a most important decision, as it not only indicates, in the opinion of those learned Judges, who should have been parties

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to the suit on the mortgages, but what the decree should have been if the proper parties had been parties to that suit.

The case of *Mohan Manor* v. *Togu Uka* (1) which was decided by Sargent, C. J., and Birdwood, J., is an authority that a prior mortgagee who purchased the mortgage property at a sale in execution of a decree obtained by him on the 26th of January 1876 on his mortgage, to which decree the second mortgagee was not a party, did not lose the benefit of the security created by the first mortgage, and could use it as weapon of attack in his suit against the second mortgagee for possession, who, in that case, was allowed six months within which to redeem on payment of what was due on the first mortgage. The Court directed that the account of the mortgage debt should be taken on the basis of what was due on or by the decree of the 26th of January 1876.

In *Zalim Gir* v. *Ram Charan Singh* (2) Bhairo Singh, in 1871, executed a mortgage deed in favor of Panna Lal in consideration of an advance, and as security for such advance hypothecated his zemindari property. In 1872 Bhairo Singh executed a similar deed in favor of Panna Lal, the consideration being a further advance. In 1874 Bhairo Singh mortgaged 117 bighas 7 biswas and 10 dhurs of *sir* and cultivatory land belonging to his zemindari to Zalim Gir, the defendant. In 1877 Bhairo Singh made a conditional sale of his zemindari to Ram Charan Singh, the plaintiff, the consideration being Rs. 4,700, which was required for, and applied to the paying off of, the mortgages of 1871 and 1872, held by Panna Lal. In 1887 Bhairo Singh made another mortgage to Zalim Gir of the property mortgaged by the bond of 1874. Zalim Gir having brought a suit against Bhairo Singh upon the bonds of 1874 and 1878, obtained on the 9th of November 1881, a decree for Rs. 2,064-14. Zalim Gir proceeded to execute that decree on the property mortgaged to him, and the sale was advertised for the 20th of November 1883. Ram Charan Singh having taken proceedings under the deed of 1877 the sale to him was, on the 19th March 1883, foreclosed. On the 19th of November 1883, Ram Charan Singh brought his suit

(1) I. L. R. 10 Bom. 224. (2) I. L. R. 10 All. 629.

against Zalim Gir to have it declared that Zalim Gir was not entitled to bring the property to sale. Straight and Tyrrell, J.J., in July 1888, being of opinion that Ram Charan Singh was entitled to pay the securities of 1871 and 1872 in aid as prior incumbrances, made a decree declaring that Zalim Gir should only be permitted to bring the property to sale under his decree in respect of his mortgage of 1874, when he had satisfied the mortgage bonds of 1871 and 1872, then in the possession of Ram Charan Singh.

In *Umes Chunder Sircar* v. *Zahur Fatima* (1) the facts and transactions were somewhat complicated, but so far as is material for the consideration of the question before us they appear to have been shortly as follows:—

The plaintiff was a puisne mortgagee of 12 annas of mauza Sindilla in the Gaya district. He had also obtained transfers of other mortgages upon the same estate, and had at judicial sales bought fractional parts of it. The defendants had also acquired mortgage interests in the mauza—some prior and some subsequent to the plaintiff's. They were sued by the plaintiff who sought to redeem the prior incumbrances so as to make his own charges the first on the property. In the alternative the plaintiff claimed to have a direction made for the sale of the property, and an order that out of the proceeds the mortgage money due to all the parties should be paid according to their several priorities. The first Court decided the plaintiff was entitled to redeem; but, being of opinion that the usual practice was to decree a sale when the mortgagor did not appear to pay off incumbrances, the nett proceeds of the sale being ordered to be divided among the mortgagees according to their priority, instead of giving a decree for redemption, made a decree for sale on the plaintiff's alternative prayer for relief, and gave certain directions to be observed in the taking of the accounts. The first Court by its decree of the 17th of September 1883 directed, so far as is material for our consideration here, a sale of the entire estate, free from all incumbrances, the upset price to be fixed at a sum equal to the aggregate amounts of the purchase-money paid

(1) L R 17 I. A., 201 s c. I. L R. 18 Calc., 164.

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by the defendants Fazl-ul-Bari and Zahur Fatima, being the value of their proprietary right and mortgage liens, but without interest, they having been in possession of their shares, *plus* costs of suit and costs of sale, both parties to have liberty to buy at the sale, of which the proceeds were to be applied in discharge of the incumbrances found by the accounts in order of their priority, and any surplus to go to the proprietors in proportion of their shares. On appeal, Prinsep and Grant, J.J., dismissed the suit as to certain portions of the property (17 dhurs and a 2-annas share) holding that as to those portions of the property the plaintiff had not established title; but in other respects affirmed the decree for sale of the first Court. On appeal to Her Majesty in Council, their Lordships of the Privy Council differing from the High Court, held that the 17 dhurs and the 2-annas share were liable to be sold at the suit of the plaintiff. Their Lordships gave certain directions as to the interest which was to be allowed in taking the accounts. Their Lordships discharged the order of the High Court, and instead made an order declaring the plaintiff's right to redeem Zahur's prior incumbrance; and in the event of his exercising such right to redeem, they declared the rights of Zahur in respect of her previous incumbrance to redeem the plaintiff.

They directed the Court to make such enquiries and take such accounts as were proper for carrying their declarations into effect, and to fix reasonable periods of time within which the plaintiff and Zahur should exercise the rights of redemption declared to belong to them. Their Lordships also declared that if the plaintiff and Zahur, respectively, did not exercise their rights of redemption within such time as the Court by its final order in that behalf might direct, they should respectively be foreclosed and debarred from all right of redemption, and in all other respects they affirmed the decree of the first Court of the 17th of September 1883.

Excepting the decision in *Raghunath Prasad* v. *Jurawan Rai* (1), possibly the judgment of Turner, J., in *Khub Chand* v. *Kalian Das* (2), his judgment in *Vencata Chella Kandian* v. *Panjanadien*

(1) I. L. R. 8, All., 105. (2) I. L. R. 1, All., 247.

(1), the decision in *Gangadhara* v. *Sivarama* (2), the judgment of Mahmood, J., in *Sirbadh Rai* v. *Raghunath Prasad* (3), and his judgment in *Janki Prasad* v. *Sri Matra Mautangui Debia* (4), the decisions to which I have referred show, and I think rightly, that as well before as since Act IV of 1882 came into force, a mortgagee had no right to bring mortgaged property to sale under his mortgage without redeeming the prior mortgagee, if any, or affording the subsequent mortgagee, if any, an opportunity to redeem, and that in a suit by a mortgagee for sale on his mortgage, the other mortgagees, whether prior or subsequent, were necessary parties; and further that the property which might effectively be brought to sale under a decree for sale in a mortgage suit was the specific immovable property, and not merely the rights and interests of the plaintiff and his mortgagor in such property. I may, I think, fairly assume that those of the decisions to which I have referred which were prior to 1882 were considered by the Legislature and its advisers before the Legislature passed Act IV of 1882, the Preamble of which is as follows:—"Whereas it is expedient to define and amend certain parts of the law relating to the transfer of property by act of parties, it is hereby enacted as follows:" I now propose to consider Act IV of 1882, so far as it bears on the questions before us. I shall also refer to section 25 of the English Statute 44 and 45 Vic., c. 41, which has been pressed upon our attention, and which, it was contended, was followed by the Indian Legislature in Chapter IV of Act IV of 1882. The Transfer of Property Act, 1882 (Act IV of 1882), received the assent of the Governor-General on the 17th of February 1882, and came into force on the 1st of July 1882. The history of that Act is to be found at the close of the Introduction to the Act in Dr. Whiteley Stokes' Anglo-Indian Codes. The transfer of Property Act, 1882, differs in many important particulars with regard to mortgages from the Conveyancing and Law of Property Act, 1881 (44 and 45 Vic., c. 41), which having received the Royal Assent on the 22nd of August 1881, came into force on the 31st of December 1881. We may

(1) I. L. R. 4, Mad, 213.
(2) I. L. R. 8, Mad., 246.
(3) I. L. R. 7, All., 568.
(4) I. L. R. 7, All, 577.

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fairly assume that the Legislature and its advisers, before the Transfer of Property Act, 1882, was passed, were aware of the provisions contained in the 44 and 45 Vic., c. 41. A comparison of section 25 of that Statute with some of the sections in Chapter IV of Act IV of 1882 will show how dissimilar in many important respects are the provisions contained in the latter sections to the provisions contained in section 25 of 44 and 45 Vic., c. 41. Many of the provisions contained in section 25 of the 44 and 45 Vic., c. 41, appear to me to be more or less dissimilar to the provisions contained in sections 67, 74, 86, 87, 88, 89, 90, 92, 93, 96 and 97 of Act IV of 1882. Under sub-section 1 of section 25 of 44 and 45 Vic., c. 41, any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption in the alternative. Under Act IV of 1882, section 60, a mortgagor has, after the principal money has become payable, a right of suit for redemption. Under section 75 every second or subsequent mortgagee as against a prior mortgagee or mortgagees has a right of suit for redemption if his mortgagor has a right of suit for redemption against such prior mortgagee or mortgagees, but not otherwise. Section 91 gives certain other persons a right of suit for redemption. I do not suppose that it could be contended that any of the persons mentioned in section 91 could maintain a suit against a prior incumbrancer, unless such person derives title through or from a person who had, prior to the suit, a right of suit for redemption against such prior incumbrancer, or in other words, that any of the persons referred to in section 91 could be in a better position to maintain a suit for redemption against a prior incumbrancer than would a second or subsequent mortgagee under section 75. In a suit for redemption under sections 92 and 93 an order of sale cannot be made without giving the plaintiff an opportunity, after accounts have been taken or the amount due has been declared, of redeeming, and if the plaintiff makes default in paying such amount, it is on the application of the defendant that the Court can make final order for sale. Under sub-section 2 of section 25 of the 44 and 45 Vic.,

c. 41, in any action, whether for foreclosure, or for redemption, or for sale, the Court, on the request of the mortgagee or of any person interested either in the mortgage money or in the right of redemption, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgage property on such terms as it thinks fit, including if it thinks fit, the deposit in Court of a reasonable sum, fixed by the Court, to meet the expenses of sale and to secure performance of the terms. Under that section, Fry, J., in *Woolley* v. *Colman* (1), held that a reserved price large enough to cover what was due to mortgagees who opposed the sale must be fixd; that the plaintiff should give security for the costs of the sale, the conduct of which was given to him, and which was directed to take place out of Court; and that the proceeds of the sale should be brought into the Court.

The rights of a mortgagee as against his mortgagor, so far as the right to maintain a suit for foreclosure or sale are concerned, are defined by section 67 of Act IV of 1882. Section 75 of that Act gives, by declaration of the law, a second or subsequent mortgagee, so far as regards redemption, foreclosure and sale of the mortgage property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees, if any, as he has against his mortgagor. Whether the suit be for foreclosure under sections 86 and 87 or for sale under sections 88 and 89, an opportunity must be allowed the defendant, after accounts have been taken, or the amount due has been declared, of paying the amount due before final foreclosure or final order for sale.

I think it is from the sections to which I have referred apparent that the Legislature in passing Act IV of 1882, did not in Chapter IV follow section 25 of 44 and 45 Vic., c. 41.

Before proceeding further to consider Chapter IV of Act IV of 1882, I shall refer to Section 2 of that Act. By section 2 of Act IV of 1882 it is enacted that nothing in the Act contained

(1) L. R. 21 Ch. D, 169.

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shall be deemed to affect " (*c*) any right or liability arising out of a legal relation constituted before this Act comes into force, or any relief in respect of any such right or liability : or (*d*) save as provided by section 57 and Chapter IV of this Act, any transfer by operation of law, or by or in execution of a decree or order of a Court of competent jurisdiction." The procedure by which a right or liability may be determined or enforced or a relief may be obtained is not a right, liability or relief within the meaning of saving clause (*c*) of section 2. On that point *Ganga Sahai* v. *Kishen Sahai* (1) and *Bholo Sundari Debi* v. *Rakhal Chunder Bose* (2) are authorities. As was said by James, L.J., in *Warner* v. *Murdoch* (3) " no one has a vested right in any particular form of procedure."

I have referred to saving clause (*c*) of section 2 of Act IV of 1882, as it has been arranged that we should in our judgment in this appeal express our opinions as well on the general principles relating to the rights, liabilities and reliefs of the parties to this appeal, as on the general principles relating to the rights, liabilities and reliefs of the parties to another appeal which has been argued, the mortgages in which were made prior to the coming into force of Act IV of 1882. In my opinion the rights, liabilities and reliefs of mortgagors and mortgagees, including second and subsequent mortgagees, so far as redemption, foreclosure and sale are concerned, were in British India before Act IV of 1882 came into force what Chapter IV of that Act has defined and declared such rights, liabilities and reliefs to be. The procedure by which such rights and liabilities were allowed to be determined and enforced, and by which such reliefs were allowed to be obtained, was not always the same and was in some respects inconsistent with the provisions of Chapter IV of Act IV of 1882

It has been contended that sections 96 and 97 of Act IV of 1882 indicate that under Chapter IV of that Act a Court may, at the suit of a second mortgagee, order the mortgaged property to be sold subject to the prior mortgage, that is, order that the pro-

(1) I. L. R., 6 All., 262. (2) I. L. R. 12 Calc., 583.
(3) L. R. 4 Ch. D., 752.

perty be sold without the prior mortgage being redeemed, and without the consent of the prior mortgagee to the property being sold freed from the prior mortgage being given. Section 96 is not happily worded; but I cannot find in Chapter IV any provision enabling a Court to make such an order or protecting the interests of the prior mortgagee. If such an order could be made, certainly section 97 would not protect his interests. I regard the words "subject to a prior mortgage" in section 96 as mere words of description. If section 96 were intended to have the meaning which it has been contended it has, it ought to have been—"If any property the sale of which is directed under this chapter is ordered to be sold subject to a prior mortgage, the Court may, &c." It has been contended that as section 295 of the Code of Civil Procedure contemplates a judgment-creditor bringing to sale in execution of an ordinary money-decree mortgaged property, and selling it subject to a mortgage or charge, and also contemplates immovable property being sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, we should construe Chapter IV of Act IV of 1882 so as to give to a second mortgagee the same rights which a judgment-creditor would have under his ordinary money-decree. That, in my opinion, cannot be done. We must construe each Act on its own wording and in accordance with its own context. Besides the cases are not similar. In the one case the second mortgagee has the rights and reliefs which Act IV of 1882 declares he has under the mortgage contract which he accepted. They are the creation of a mortgage contract controlled by the law relating to mortgage contracts. In the other case the judgment-creditor's decree may have been obtained in a suit brought upon any one of a great variety of causes of action in no way dependent on, or relating to a mortgage contract. Although such judgment-creditor would, under section 91 of Act IV of 1882, when he had attached the mortgagor's interest in the property, be a person entitled to redeem and to institute a suit for redemption, he would not, unless he were a mortgagee of the property which he sought to sell, be compelled by section 99, in order to bring the property to sale, to

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bring a suit under section 67 of that Act. The case of immovable property being sold in execution of a decree ordering its sale for the discharge of an incumbrance referred to in clause (*c*) of section 295 of the Code of Civil Procedure must of necessity, if the suit was instituted after the 1st of July 1882, be a case in which the order for sale had been made under Chapter IV of Act IV of 1882.

The plaintiff's mortgage of the 6th of August 1885 is a simple mortgage. This suit was instituted after the mortgage money had become payable to him. No decree had been made for redemption, nor had the mortgage-money been paid or deposited. If that mortgage had been the first and only mortgage, it is clear that under sections 67 and 88 of the Transfer of Property Act 1882, the plaintiff would have been entitled to a decree to the effect mentioned in the first and second paragraphs of section 86, and also ordering that in default of the mortgagor paying as therein mentioned the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what would be found due to the plaintiff in account, and that the balance, if any, be paid to the mortgagor-defendant or other persons entitled to receive the same. Does the fact that the plaintiff is not a sole, but a second mortgagee, and that there is a subsequent mortgage, namely, that of the 21st August 1885, alter the rights which he would have has under sections 67 and 88 if he had been the sole mortgagee? The answer to that question must in my opinion, depend on a consideration of other sections of the Transfer of Property Act, 1882. In considering those sections, and in endeavouring to ascertain what was the intention of the Legislature, we must bear in mind that the property which a Court is, under section 88 to order to be sold, is the "mortgaged property or a sufficient part thereof."

The plaintiff, in order to bring the mortgaged property to sale, was compelled by section 99 to bring his suit under section 67 of the Act. The plaintiff having had notice of Hari Prasad's mort-

gages was bound by section 85 to join Hari Prasad as a party to the suit. What is the effect on his suit of his not having joined Mata Prasad I will consider later on.

The object of section 85 must be to give to all the parties thereby required to be joined as parties to the suit an opportunity of protecting their own interests, and to enable the Court to determine the respective rights of all such parties, and to pass a decree and order which would be consistent with, and not in violation of, such rights, and thus to prevent opportunities for harassing and complicated subsequent litigation arising.

The rights of a second or subsequent mortgagee, so far as regards redemption, foreclosure and sale of the mortgaged property are, by reference, declared and defined by section 75. Those rights, as I have pointed out, are as against the prior mortgagee or mortgagees the same rights as his mortgagor has against such prior mortgagee or mortgagees, and no more, and as against subsequent mortgagees, if any, the same rights which he has against his mortgagor and no more.

Now what are the rights which the mortgagor has against a mortgagee, so far as redemption or sale are concerned?

Those rights of the mortgagor, so far as mortgages other than usufructuary mortgages are concerned, are declared and defined by sections 60 and 61. The right of the mortgagor under section 60 is a right to redeem, which is to be enforced by a suit for redemption. The right to redeem does not, under section 67, arise until the principal money has become payable. As the right of the second or subsequent mortgagee as against a prior mortgagee is confined to the right which the mortgagor has against such prior mortgagee, let us see what is the decree which a mortgagor can, in a properly framed suit on a mortgage other than an usufructuary mortgage obtain against his first mortgagee. That decree is a decree under section 92 "ordering that an account be taken of what will be due to the defendant for the mortgage-money and for his costs of the suit, if any, awarded to him on the day next hereinafter referred to, or declaring the amount so due at the date of

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the decree; that upon the plaintiff paying to the defendant or into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall retransfer it to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him: or, when the defendant claims by derived title, by those under whom he claims and shall, if necessary, put the plaintiff into possession of the mortgaged property; and that if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary), be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold."

It is obvious from section 93 that in case of default by the plaintiff in paying the amount due, it is the defendant, and not the plaintiff, who can obtain in one case an order that the plaintiff be debarred of all right to redeem, and in the other that the mortgaged property be sold.

In case of an order for sale under sections 92 and 93, the order must be that "such property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court, and applied in payment of what is found due to the defendant, and that the balance be paid to the plaintiff or other persons entitled to receive the same."

Section 93 further enacts that "on the passing of any order under this section the plaintiff's right to redeem, and the security, shall, as regards the property affected by the order, both be extinguished."

As I read the sections of the Transfer of Property Act, 1882, relating to the rights and liabilities of mortgagors and mortgagees the word "property" is used throughout those sections as meaning the actual immovable property mortgaged, and not as meaning merely particular rights and interests in such property as dis-

tinguished and separated from the actual immovable property itself. In other words, the word "property" is, in my opinion, used throughout Chapter IV of the Transfer of Property Act, 1882, in the same sense and with the same meaning as that word is used in section 58, where a mortgage is defined as "the transfer of an interest in *specific immovable property* for the purpose of securing the payment, &c." If, as has been contended, the Legislature had intended that a bare right to redeem, as apart and distinguished from the immovable property, should be treated and considered as "property," as that word is used throughout Chapter IV of Act IV of 1882, the Legislature could have so enacted; but in my opinion it has not. The property to be sold within the meaning of section 67 must mean the immovable property. "The mortgaged property or a sufficient part thereof" in section 88 must mean the mortgaged immovable property or a part of it, and in neither section can the word "property" mean merely the bare rights and interests of a mortgagor, although the sale of the immovable mortgaged property under a decree for sale in a properly framed suit would carry with it such rights and interests.

In a suit for foreclosure the defendant in one event is to be put into possession of the property, and in the other possession of the property is to be delivered to the plaintiff. In a suit for redemption the plaintiff is in one event to be put into possession of the mortgaged property, and in the other possession of the property is be delivered to the defendant. By section 91 the right which (*a*) any person (other than the mortgagee of the interest sought to be redeemed) having any interest in, or charge upon the property, or (*b*) any person having any interest in, or charge upon the right to redeem the property, or (*f*) the judgment creditor of the mortgagor, when he has obtained execution by attachment of the mortgagor's interest in the property, has, is a right to redeem or to institute a suit for redemption of the "mortgaged property." It is, in my opinion, obvious that in section 91 an "interest" in the property is not synonymous with the "mortgaged property." In section 95 actual possession of the

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mortgaged property, and not the possession of an interest in the mortgaged property, or a right to the possession of the mortgaged property, must be the possession referred to.

To construe the word "property" as it is used in Chapter IV of Act IV of 1882 otherwise than as I construe it, would, it appears to me, necessarily lead to the conclusion that under that chapter a bare right which is known in England as an equity of redemption can be brought to sale and sold.

It has been contended that "immovable property" as defined in clause (5) of section 2 of the General Clauses Act, 1868, (Act I of 1868) includes the rights and interests of a mortgagor or of a mortgagee, and, for example, of a second mortgagee in mortgage property. Whether or not that contention be well founded, it would, in my opinion, be repugnant to the context to hold that the word "property," as it is used in Chapter IV of Act IV of 1882, means rights and interests in mortgaged property as distinct from the actual immovable property, as, for instance, land itself. The law in England or works on Equity or Jurisprudence can, in my opinion, no more help us to a construction of the word "property" in Chapter IV than can Webster's Dictionary.

Now let us see whether it could possibly have been the intention of the Legislature that a second mortgagee should, without redeeming a prior mortgage, be entitled to bring the mortgaged property, or any part of it, to sale under the Transfer of Property Act; and having regard to section 99, it is only by a suit under that Act that he could, if at all, bring such property or any part of it to sale. It could not have been the intention of the Legislature to give to a second mortgagee as against the prior mortgagee more extensive rights than the mortgagor had against such prior mortgagee. If the prior mortgage was an usufructuary mortgage, under which the mortgagee was authorised to pay himself the mortgage-money from the rents and profits of the property, the mortgagor's right was to recover possession of the property when such money was paid. The mortgagor could not, either before or since the Transfer or Property Act, 1882, came

into force, redeem or get possession of or bring to sale such property or any part of it until the usufruct had satisfied the mortgage-money. I fail to see on what principle the second mortgagee could redeem that property or bring it or any part of it to sale, or how he by a subsequent contract to which the prior mortgagee was not a party could deprive that prior mortgagee of any of the benefits of his prior contract.

Let us take another case, namely that of a prior simple mortgage, the time for payment of the principal money of which had not arrived. In that case the mortgagor could not, either before or since the Transfer of Property Act, 1882, came into force, redeem or bring to sale the hypothecated property. On what principle could the second mortgagee redeem or bring that property to sale, or how could he under his subsequent contract obtain the right to deprive the prior mortgagee of the benefits of his prior contract by redeeming or bringing to sale before the due date of that prior mortgage the property or any part of it which had been hypothecated as security for the repayment of the mortgage-money of the first mortgage?

It has been contended that, if my construction of Act IV of 1882 be the correct one, cases of great hardship would occur, and as an instance, a case has been supposed in which there are two mortgages of the same property, the first of which was made on the 1st of January 1890, the 1st of January 1900 being the date when, according to the mortgage contract, the principal money might be repaid and the mortgage be redeemed; and the second mortgage made on the 1st of February 1891, the 1st of February 1893 being the date when, according to the mortgage contract, the principal money should become due and repayable. It has been contended that in such a case it would be hard and unjust to prevent the second mortgagee from instituting and successfully maintaining a suit to obtain repayment of his mortgage-money by sale of the mortgaged property until the 2nd of January 1900, when his mortgage contract made the money repayable on the 1st of February 1893.

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I can see no injustice in such a case; and as to hardship, if there were any, the second mortgagee brought it upon himself. If the second mortgagee had, before he advanced his money on the second mortgage, notice in fact of the first mortgage, he advanced his mortgage money with his eyes open. If the first mortgage was registered, the second mortgagee could by a search in the Registry have ascertained the nature of the security which he was taking. If the first mortgage was not one which, in order to make it available against the immovable property comprised in it, it was necessary to register under the Registration Act of 1877 (Act III of 1877), and was not in fact registered, the second mortgagee could obtain priority for his second mortgage by registering it, provided he had not had notice of the first mortgage.

On the other hand, it appears to me that it would be grossly unjust and inequitable to deprive a first mortgagee of any of the benefits of his mortgage contract for the advantage of the second mortgagee, to whose contract the first mortgagee was not a party and who had not been induced to enter into that contract by any representations of the first mortgagee such as would entitle the second mortgagee to relief against the first mortgagee.

Having regard to section 89, and particularly to the latter half of it, I am of opinion that the suit for sale under section 88 can only be brought by a person entitled to foreclose against a person having a right to redeem. As I construe Act IV of 1882 a second mortgagee, if he desires to bring the mortgaged property or any part of it to sale, must bring his suit under that Act; and that suit, so far as it is as suit against the mortgagor, must be one for sale; so far as it is a suit against the prior mortgagee, it must be a suit under sections 92 and 93, in which case without redemption he could not get an order for sale of the mortgaged property or any part of it under section 88 against the mortgagor, and his suit so far as it is a suit against the subsequent mortgagees, must be a suit for foreclosure of sale. The suit before us in appeal is not such a suit. I would be disposed even at this stage of the suit to allow the plaintiff to amend in order that such relief as he might be

entitled to might be granted to him, if in other respects the suit was one in compliance with Act IV of 1882. But it is not. Mata Prasad, the mortgagee of the 21st of August 1885, was not joined as a party to this suit. Mata Prasad's mortgage was a registered mortgage, and Mata Prasad's suit on his mortgage was instituted in the Court of the Subordinate Judge of Gorakhpur on the same day, the 7th of January 1877, on which the present plaintiffs suit was instituted in the same Court—Mata Prasad's suit being entered in the Court Register of original suits as No. 2 of 1887 and the plaintiff's as No. 3 of 1887. The two suits were heard together by the Subordinate Judge.

Having regard to those facts, and to section 3 of Act IV of 1882, which enacts, so far as is material, that "a person is said to have 'notice' of a fact when he actually knows that fact, or when, but for wilful abstention from an enquiry or search which he ought to have made, or gross negligence, he would have known it,"—I am bound to hold that the plaintiff had, within the meaning of section 85 of Act IV of 1882, notice of the interest of Mata Prasad in the property comprised in the plaintiff's mortgage here in suit, and that not having joined Mata Prasad as a party to this suit the plaintiff has failed to comply with the imperative condition of section 85 of Act IV of 1882. If the plaintiff had through an oversight omitted, in the first instance, to join Mata Prasad, he could have applied under section 32 of the Code of Civil Procedure to have Mata Prasad made a defendant. He never did so. Notwithstanding section 34 of that Code, I am of opinion that we must act upon the imperative words in section 85 of Act IV of 1882. At this stage of the suit I think we ought not to exercise the discretionary power vested in a Court under section 32 of the Code of Civil Procedure, particularly as the suit is not one which, without other amendments involving practically a fresh trial could be maintained. It is necessary that litigants should be made to know and feel that the Statute Law, when it affects their rights of suit, must be complied with, and that in such a case as this Chapter IV of Act IV of 1882 must not be ignored and treated as a dead

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letter. Section 85 was advisedly, and with the object of preventing multiplicity of suits, introduced into Act IV of 1885, and we must give effect to it by dismissing, as I would on that ground alone if there were no other, this appeal with costs, and confirming the dismissal of the suit so far as it has been dismissed below with costs.

MAHMOOD, J.—This case is so closely connected with S. A. No. 1813 of 1888 that both these cases were disposed of together by the two Courts below, and I think it will be convenient to dispose of them here in one and the same judgment.

Dealing with these two cases together, the facts, although clearly stated in the judgment of the learned Judge of the lower appellate Court, may be recapitulated here, since the points of law which they raise are important and have been referred to a Full Bench consisting of all the members of this Court.

The facts are these. Two brothers Kazim Husain and Nadir Husain owned shares in various villages and they have dealt with those shares by various deeds of transfer which, so far as these two cases are concerned, require mention only of the following transactions :—

(1.) Both Kazim Husain and Nadir Husain executed a simple mortgage in favour of the defendant Hari Prasad, hypothecating their 8 annas share in mauza Barwa Kutwa and their 5 annas and 4 pies share in mauza Bhisia Kattiya, covenanting that they would repay the amount of money due on the mortgage in the course of one year, that till such payment they would not alienate the hypothecated property, and that in default of such payment, the money should be recoverable by sale of the hypothecated property in due course of the law. The amount for which this hypothecation was made is represented in the deed to be Rs. 2,901, and the deed is dated the 10th September, 1882.

(2.) On the 23rd February, 1884, the same mortgagors, namely Kazim Husain and Nadir Husain, took a further advance from the same mortgagee, *viz.*, Hari Prasad, of a sum of Rs. 2,799 and executed a simple mortgage hypothecating again their 8 annas share

in the above-mentioned mauza Barwa Kutwa and only a 4 annas share in mauza Bhisia Kattiya together with other shares in five other villages of which express mention is not necessary for the purposes of this case. I may mention, however, that the deed contains a covenant to the effect, that the money due upon the bond would be repaid within a year, that till such payment the mortgagors would not alienate the hypothecated property, and that in default of payment, the mortgagee would be entitled to recover the money due upon the mortgage by enforcement of the mortgage.

(3.) On the 6th August, 1885, a third transaction took place to which the aforesaid mortgagee Hari Prasad was no party. This transaction was a simple mortgage executed by the above-mentioned Kazim Husain alone in favour of the plaintiff Matadin Kasodhan in lieu of Rs. 1,000 hypothecating the mortgagor's 4 annas share in mauza Barwa Kutwa and 2 annas share in mauza Bhisia Kattiya together with certain small shares in two other villages. The money thus borrowed was promised to be repaid within three months, and in default of such payment it was covenanted *inter alia* that the properties hypothecated were to be held as security for repayment of the loan and that till such repayment had taken place, the hypothecated properties could not be alienated by the mortgagor. The terms of the covenants contained in this hypothecation deed are of special importance because the suit from which this appeal has arisen is based upon this document. In view of this circumstances and with reference to what may follow in this judgment it is necessary to point out that the 4 annas share of mouza Barwa Kutwa, which formed part of the property hypothecated in this bond by the mortgagor Kazim Husain (defendant) is the same 4 annas share as that which, he, conjointly with his brother Nadir Husain, had already hypothecated to Hari Prasad by the two earlier deeds which I have mentioned, namely, the simple mortgage deeds of the 10th September, 1882, and the 23rd February, 1884.

(4.) The fourth transaction is a simple mortgage executed by Nadir Husain alone on the 12th August, 1885, whereby in lieu of Rs. 1,999 he hypothecated his very same 4 annas share of mauza

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Barwa Kutwa to Hari Prasad, defendant, along with other property of which specific mention is not necessary. It is also needless to say that Hari Prasad, the mortgagee (defendant), already held this 4 annas share of Nadir Husain in mortgage under his two earlier deeds of the 10th September, 1882, and the 23rd February, 1884. But I may mention here that the deed of the 12th August, 1885, contains a covenant to the effect that the money was to be repaid within one year, and that till such repayment, the mortgagor would not alienate the mortgaged property.

(5.) The fifth transaction is another simple mortgage executed by Kazim Husain alone in favour of Mata Prasad, *alias* Ghingan Ram, who is plaintiff in the suit out of which the connected S. A. No. 1213 of 1888 has arisen. The deed is dated the 21st August, 1885, and the amount for which it was executed is Rs. 999 and as a security for the repayment of the money the same 4-annas share in mauza Barwa Kutwa, as that which was covered by the above mentioned mortgages of the 10th September 1882, the 23rd February 1884, in favour of Hari Prasad, and the 6th August 1885, in favour of Mata Din Kasodhan, was given as mortgage security along with some other property. The term for repayment of this loan was fixed to be three months, and the deed whilst containing the ordidinary covenants in a hypothecation bond also covenants that till repayment of the loan the hypothecated property could not be alienated by the mortgagor. This deed is the basis of the suit out of which the connected S. A. No. 1213 of 1888 has arisen.

(6.) Then comes the most important transaction which affects these two connected suits and which indeed is probably the main reason why this case has been required to be considered by a bench consisting of all the members of the Court. The transaction is a deed of sale executed by the abovementioned brothers Kazim Husain and Nadir Husain jointly on the 20th September, 1886, in favour of the above mentioned Hari Prasad (defendant), whereby they in lieu of Rs. 14,530, stated in the deed to be the amount then due to the abovementioned mortgagee Hari Prasad under the abovementioned hypothecation bonds of the 10th September

1882, the 23rd February, 1884, and the 12th August 1885, sold their rights and interests in the 8-annas share of mauza Barwa Kutwa which already stood mortgaged not only to Hari Prasad, the vendee under the hypothecation deeds mentioned, but also to Matadin Kasodhan under Kasim Husain's deed of 6th August, 1885, and to Mata Prasad under the deed of 21st August, 1885, so far as the 4-annas share of Kasim Husain was concerned. And for the sake of clearness I may say here in passing that so far as Nadir Husain's 4-annas share in mauza Barwa Kutwa is concerned, the transactions which I have mentioned only show that under the mortgages of the 10th September 1882, the 23rd February 1884, and the 12th August 1885, and the sale-deed of the 20th September 1886, the defendant Hari Prasad *alone* is concerned both as mortgagee and as vendee and neither of the plaintiffs in these connected suits has any interest in that 4-annas share.

From the transactions which I have just described two suits have arisen, namely, the following:—

(1) A suit instituted by Matadin Kasodhan on the hypothecation deed of the 6th August 1885, and the object of the suit, as represented in the prayer contained in the plaint, is that the property covered in that bond should be brought to sale by enforcement of hypothecation lien, and that so far as the sale-deed of the 20th September 1886, can be considered in defeasance of the plaintiff's title, it should be set aside.

(2) The second suit is one filed by Mata Prasad on his hypothecation bond of the 21st August 1885, of which the terms have already been mentioned by me, seeking recovery of money by sale of the property included in his hypothecation bond by enforcement of lien.

In the Court of the Subordinate Judge which was the Court of first instance, the parties arrayed as defendants in the suit of Matadin Kasodhan, plaintiff, were Kazim Husain, the executant of the hypothecation deed of the 6th August 1885, upon which the suit was based, and also Hari Prasad, the mortgagee of the 10th September 1882, and the 23rd February, 1884, and vendee of the 4-annas

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share in mauza Barwa Kutwa included in the sale-deed of the 20th September 1886.

Similarly in the suit by Mata Prasad, the parties impleaded as defendants were the same Kazim Husain and the same Hari Prasad and both these persons were impleaded as defendants for the same reason.

From what I have already stated it will be clear that both these suits were suits of an ordinary character seeking to recover money advanced upon a simple mortgage by sale of the properties covered and hypothecated in the deeds upon which the suits respectively proceeded, that is to say, in the case of Mata Din Kasodhan, plaintiff, the properties mentioned in the hypothecation deed of the 6th August 1885, (S. A. No. 1210 of 1888) and in the case of Mata Prasad (S. A. No. 1213 of 1888) the hypothecation deed of the 21st August 1885.

The suits being thus arrayed and the reliefs prayed for in them being thus similar, Kazim Husain, the mortgagor, did not appear to defend either of them, but naturally Hari Prasad, whose interest in the 4-annas share of Kazim Husain in mauza Barwa Kutwa has already been described by me (with reference to the hypothecation deeds of the 10th September 1882, and the 23rd February 1884, and also the sale-deed of the 20th September 1886), appeared to resist both actions relying upon his mortgages of the 10th September 1882, and the 23rd February 1884, and also on his sale-deed of the 20th September 1886.

The Court of first instance decreed the claim of Matadin Kasodhan, plaintiff so far as the mortgagor Kazim Husain (defendant) was concerned in respect of the hypothecated properties other than the 4 annas share in mauza Barwa Kutwa, but dismissed the suit so far as it sought to bring to sale the share above-mentioned and which had been purchased by the defendant Hari Prasad under the sale-deed of the 20th September 1886.

For similar reasons that Court passed a similar decree in the suit of Mata Prasad, which is the subject of the connected appeal (S. A. No. 1213 of 1888).

From the decrees passed by the Court of the first instance in these two connected suits, the plaintiff Matadin Kasodhan appealed to the lower appellate Court upon grounds similar to those upon which in the connected case the plaintiff Mata Prasad appealed.

Both these appeals were before the learned Judge of the lower appellate Court and he has dealt with them in one and the same judgment, with the result that he upheld the decrees of the Court of first instance and dismissed both the appeals.

From the decrees thus passed both Matadin Kasodhan plaintiff, appellant in the case, and Mata Prasad plaintiff, appellant in the connected case (S.A. No. 1213 of 1888), have appealed to this Court, and these two appeals have been considered together by the Full Bench.

Upon the facts of the case as I have stated them, taken with the pleadings of the parties, and the arguments which have been addressed to us in the Full Bench, the following questions of principle as to the law of mortgage as prevailing in this part of the British India have to be considered :—

(1) What are the legal incidents of a simple mortgage or hypothecation as understood in the law governing this part of the country?

(2) Does the mere fact of the existence of a prior simple mortgage or hypothecation debar a puisne mortgagee or hypothecatee from enforcing his lien by bringing the property to sale under order of the Court irrespective of the desire or willingness of the prior mortgagee?

(3) When a purchaser of the equity of redemption being himself a first mortgagee takes the purchase in payment of his first mortgage, does such payment defeat the puisne and mesne incumbrancer's rights in the same property or otherwise affect them?

(4) In a suit such as this, has the plaintiff a right to claim a decree for the sale of the hypothecated property without rendering himself liable to pay up the prior incumbrances or to any other

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qualification as to the prayer contained in his plaint for a decree for sale?

Before dealing with these questions, I wish to observe that I have had the great advantage of perusing the judgment which the learned Chief Justice has prepared in this case, and I may say at once that I entirely agree with him in thinking that the principle of the Full Bench ruling of this Court in *Ganga Sahai* v. *Kishen Sahai* (1) and of the Full Bench ruling of the Calcutta High Court in *Bhobo Sundari Debi* v. *Rakhal Chunder Bose* (2) renders the Transfer of Property Act (IV of 1882) applicable, so far as the question of reliefs and procedure is concerned, to mortgages executed before that Act came into force. In the present case all the transfers were made subsequent to the enforcement of the Transfer of Property Act, but I have made this observation with reference to another appeal which has been argued before the Full Bench and to which the learned Chief Justice has alluded in his judgment. I may also premise here that upon the points above enunciated by me, numerous rulings were cited in the course of the argument. All those cases have been dealt with by the learned Chief Justice in his judgment so exhaustively that it relieves me of the necessity of having to refer to them all in my judgment. I shall therefore refer only to such cases as are required for the purposes of explaining my views upon the questions of law which have to be decided as already enunciated by me.

Dealing with this case in this manner, I think in considering the first question, it is necessary to express my views as to the exact meaning of the word "*Property*" as it occurs in the preamble of the Transfer of Property Act (IV of 1882) and throughout that enactment. This is a question of interpretation, pure and simple, which must necessarily be guided by the context of the enactment in which the word is employed. I take it as a general rule of interpretation that words when employed in a statute must be understood in their most generic sense unless a restricted meaning is indicated by some provision in the same statute or in any other governing the former

(1) I. L. R., 6 All., 262. (2) I. L. R., 12 Calc., 583.

statute. The rule is too well known to require any citation of authorities, and I have thus to resort to statute law for the purpose of ascertaining whether or not the word "*Property*" has been used in its most generic and comprehensive legal sense in the Transfer of Property Act (IV of 1882). Unfortunately that enactment contains no scientific or comprehensive definition of the term; but that enactment must be read subject to the interpretation required by the "*General Clauses Act*" (I of 1868). In clauses (5) and (6) of section (2) of that enactment, definitions of immovable and movable property have been attempted though in an incomprehensive manner. In the Transfer of Property Act itself in section 3 the phrase immovable property is not fully explained any more than the word "*property*" itself. But I think that section 6 of that enactment in making exceptions to the capability of transfer of property must be understood to use the term *property* in its widest and most generic legal sense, for otherwise the exceptions would be wholly unnecessary. That sense is, I think, well represented in the meaning assigned to the word in Wharton's Law Lexicon where it is represented to mean: "the highest right a man can have to any thing, being used for that right which one has to lands or tenements, goods or chattels, which does not depend on another's courtesy. Property is of three sorts: absolute, qualified, and possessory."

And I may say that, so far as questions of possession are dealt with in the Act, it appears to me that "*possession*" in those provisions is not to be restricted merely to actual physical possession but should be understood to mean such possession as the nature of the property is susceptible of, for otherwise many classes of transfer, resting for their validity upon possession, would become invalid, a view consistent with the principle of *Palani* v. *Setambara* (1) and what was said by Prinsep, J., in *Narain Chunder Chukerbulty* v. *Dataram Roy* (2) as to zemindari estates of which the land is in actual possession of tenants.

Therefore such indications as s. 6 of the Transfer of Property Act affords, induce me to hold that the phrase "*transfer of pro-*

(1) I. L. R., 9 Mad., 267. (2) I. L. R, 8 Calc., 597 (at p. 611).

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perty" as it occurs in s. 5 and the phrase "*an interest in specific immoveable property*" as it occurs in s. 58 of the Transfer of Property Act include what is known to the English Law as the "*Equity of redemption*," that is to say, such rights and interests as still remain to the owner of the property after he has executed a mortgage of any kind. It is a misfortune that the phrase "*Equity of redemption*" was ever introduced into the Mufassil Courts of British India, for that phrase is an extremely technical phrase of the English Law of real property, and owes its origin and has reference to the various procedures which at one time drew a hard-and-fast distinction between the procedure of the Courts of Common Law and of the Courts of Chancery in England. The phrase also has reference to the peculiarities of the English system of mortgages, vastly different from the Indian system of mortgages, and I think it has been wisely avoided in the Transfer of Property Act. Now, I will not go to the original text-books of the English Law of mortgages for showing what a mortgage means there, because the definition of an English mortgage as contained in clause (*e*) of s. 58 of the Transfer of Property Act helps me with a specific definition of what I understand by an English mortgage. The clause runs as follows :—

"Where the mortgagor binds himself to repay the mortgage money on a certain date, and transfers the mortgaged property absolutely to the mortgagee but subject to a proviso that he will retransfer it to the mortgagor upon payment of the mortgage-money as agreed, the transaction is called an English mortgage."

Now, although this kind of mortgage may resemble, in some respects, the Indian *baibilwafa* or mortgage by conditional sale as defined in clause (*c*) of s. 58 of the Transfer of Property Act, one thing is certain, *viz.*, that an Indian mortgage of *any kind* does not mean the conveyance of "*property absolutely to the mortgagee*" so that even if the English technical phrases "*legal estate*" as distinguished from "*equitable estate*" were to be imported into the Indian Law of mortgages, it must be held that notwithstanding the execution of a mortgage of any kind, the "*legal estate*" vests not in the mortgagee but remains in the hands of the mortgagor, for,

he continues to be the owner of the property, entitled to deal with it as he likes, subject, of course, to the incidents of the mortgage which he has already executed. If any authority is necessary for sustaining this proposition I willingly go back as far as the 30th April 1858, when three Judges of the Calcutta Sudder Diwani Adalat in the case of *Saadat Ali Khan, and others* v. *The Collector of Sarun and others* (1) concurred in saying that :—

"It is quite clear that, under the *Mufassil* Law of mortgages, the right of ownership in the mortgaged property does not pass to the mortgagee, leaving *only* the equity of redemption in the mortgagor; the right of ownership together with the right of redemption remain with the mortgagor, and until the property be actually foreclosed, and the sale become absolute, the right of ownership does not pass. This doctrine holds equally applicable to conditional sales or usufructuary mortgages: it follows, that the mortgagees in the present suit, who, whatever the nature of the mortgage, were in possession, were simply usufructuaries, and as such, they enjoy no right of ownership."

I have cited this authority in order to make a marked distinction between the English Law of mortgages and the Indian Law, not only over the question of legal and equitable estates but also over the doctrine of tacking to which I shall have to refer later on.

Leaving that question alone for a while, it is important for me in considering the first question, as enunciated by me, to realize the exact legal incidents of a simple mortgage or hypothecation, as understood in our law. And I am afraid, since this is a Full Bench case, I must repeat what I said in my dissentient judgment in another Full Bench case *Gopal Pandey* v. *Parsotam Das* (2) where I had to consider the same question, without having the benefit of knowing whether my views as to the nature of a simple mortgage or hypothecation were approved by the majority of the Court. At the risk of prolixity and in order to avoid rewriting the same views in other words I quote the following passages from my judgment

(1) Calcutta S. D. A. 1858 849 (at p. 844).

(2) I. L. R. 5 All 121 (pp. 137-140).

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in the above mentioned case. There I said referring to simple mortgages :—

"Now the word "*transfer*" has long been recognised to be a technical term of law in all countries where English in the language of the Legislature and of the Courts of Justice, It is often used as a convertible term with "*alienation*," "*conveyance*" and "*assignment*." Whether any distinction exists between the technical meanings of these expressions, and, if so, what that distinction is—it is not necessary exactly to determine. But it may be safely taken that the word "transfer" is used in law in the most generic signification, comprehending all the species of contract which pass real rights in property from one person to another.

"In considering the question immediately before us, it seems to me necessary to bear in mind that we are not at present concerned with transfers which take place by judicial process, but with such transfers only as take place between living parties by virtue of their own act. In this signification the term cannot be defined better than by saying that it means an act by which a living person conveys the whole or part of the right of ownership of property in present or future, to one or more other living persons. This being my view, the next question to consider is the exact nature of Indian mortgages in general. Mortgage as understood in this country cannot be defined better than by the definition adopted by the Legislature in s. 58 of the Transfer of property Act (IV of 1882). That definition has not in any way altered the law, but, on the contrary, has only formulated in clear language the notions of mortgage as understood by all the writers of text-books on Indian mortgages. Every word of the definition is borne out by the decisions of the Indian Courts of Justice as fully explained in Macpherson's celebrated work on Indian mortgages.

* * * * * *

"A mortgage, then, is the transfer of an interest in specific immoveable property for the purpose of securing the payment of money advanced or to be advanced by way of loan, an existing or future debt, or the performance of an engagement which may give

rise to a pecuniary liability. The transferor is called a mortgagor, the transferee a mortgagee. Now, hypothecation is only a species of mortgage. It has in India been used in the sense of a pledge, and the proper term for it is simple mortgage.

"What, then, is the nature of a simple mortgage? I again borrow the definition from the Transfer of Property Act, solely for the sake of convenience, and wholly irrespective of its legislative authority. Where, without delivering possession of the mortgaged property, the mortgagor binds himself personally to pay the mortgage money, and agrees expressly or impliedly that in the event of his failing to pay according to his contract, the mortgagee shall have a right to cause the mortgaged property to be sold and the proceeds of sale to be applied, so far as may be necessary, in payment of the mortgage money, the transaction is called a simple mortgage.

"Now, it is quite clear to my mind that the most essential of the elements which constitute the simple mortgage is *the right to cause the property to be sold*—a right without which the transaction, whatever else it may be, certainly cannot be called a hypothecation, pledge, or simple mortgage. This right does not come into existence when the actual sale takes place by virtue thereof, but it comes into existence at the time when the mortgage is made: it subsists in the property ever afterwards so long as the mortgage money remains unpaid: it limits the interests of the mortgagor as they were at the time of the mortgage. Jurisprudence recognises it as one of the various species of *Jura in re aliená*, or estates carved out of the full ownership of property. It may happen that the right, though not apparently, but in reality, is tantamount to absolute transfer in its virtual effect. For instance, when land of the value of Rs. 100 is pledged by hypothecation in lieu of a debt amounting to Rs. 101, the mortgagor is simply a nominal owner, and his *nuda proprietas* is worth less than zero. I am, therefore, of opinion that the rights created by hypothecation in this country amount to nothing more or less than a transfer of an estate amounting to a transfer of immovable property

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though of course not an absolute transfer. The feature which distinguishes hypothecation from other forms of mortgage consists in the fact that it does not entitle the mortgagee to enjoy the physical qualities of the subject of the mortgage. That this distinction does not alter the nature of the transaction so as to take it out of the category of *transfer* is clear to me from the manner in which the right is treated by jurisprudence. The reason of the juristic view is well described by a modern writer on jurisprudence. 'The *right of sale* is one of the component rights of ownership and may be parted with *separately* in order thus to add security to a personal obligation. When so parted with, is a right of pledge, which may be defined as a right *in rem* realizable by sale, given to a creditor by way of accessory security to a right *in personam*.

* * * * * *

'The objects aimed by a pledge are obviously, on the one hand, to give the creditor a security on the value of which he can rely, which he can *readily turn into money*, and which he can follow even in the hands of third parties; on the other hand to leave the enjoyment of the thing in the meantime to *its owner*, and to give him every facility for disincumbering it when the debt for which it is security shall have been paid.' (Holland p. 152.)

"Such being the very nature and essence of the rights created by hypothecation, it follows that if *hypothecation is valid and legal*, the incidents which flow from it must necessarily be held to be valid and legal too, on the principle that when the law permits a thing, it also permits that which is essential to its accomplishment. *The most essential incident of hypothecation is the eventual sale by order of Court*—a sale which in the ordinary course of law must be held by public auction, at which *ex necessitate rei* any person may bid and which must be concluded in favour of the highest bidder. *If hypothecation does not carry with it this right of sale at the instance of the mortgagee, and without any restrictions as to the class of bidders or purchasers it cannot be called hypothecation at all.* For if any such restrictions are attached to the right of sale, they are essentially repugnant to the very nature of the right

conveyed, and must end in defeating the entire object of the pledge."

These views were expressed by me so long ago as the 13th June, 1882, in the Full Bench case of *Gopal Pandey* v. *Parsotam Das* (1) and to those views I still adhere so far as they explain the legal incidents of a simple mortgage or hypothecation as understood in the Indian Law. But because these observations were made in a dissentient judgment, it was argued before me in a later case—*Kishan Lal* v. *Ganga Ram*—(2) that this view of the nature of a simple mortgage was disapproved by the majority of the Court in the Full Bench case. In delivering my judgment I took occasion to explain why such was not the case, and that explanation justified me in the later case to abide by what I have all along understood to be the legal incidents of hypothecation or simple mortgage as understood in the Indian Law.

I think I have said enough to indicate what I understand by the term "*property*" as used in the Transfer of Property Act, also what I understand by "*simple mortgage*" as described in the same enactment. And if it is necessary to explain my meaning more concretely, I will do so by taking the following illustration, which will also help me in dealing with some of the other points in this case.

Let me suppose that A is the owner of certain property X which is free of all kinds of mortgage incumbrances. A borrows Rs. 90,000 from B and executes a simple mortgage in his favour hypothecating the property X to him as security for repayment of the loan after the lapse of 70 years: the date of the mortgage being 1883.

Upon this state of things the first question is, whether after the execution of the mortgage in favour of B, A continues to be the owner of the property X or not, and whether his rights and interests, subject of course to the mortgage in favour of B, can be called "*property*" within the meaning of the Transfer of Property Act. Secondly, the question is whether such rights as B derived under

(1) I. L. R. 5 All., 121. (2) I. L. R. 13 All., 28. (pp. 49 and 50).

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his mortgage of 1883 can be called "*property*" within the meaning of the transfer of Property Act.

I am of opinion that the answer to both these questions must be the affirmative, because the negative answer would necessitate the following results:—

First.—That A, having no longer any property in X, could not execute a second mortgage, for, his power of transfer must be governed by the provisions of ss. 5 and 6 of the Transfer of Property Act, and in those sections the right of transfer refers only to the expression "*property*" as meaning what I have explained. If that explanation is erroneous, then there is no power in the Transfer of Property Act to enable a mortgagor after having executed a first mortgage to execute a second mortgage or to sell his rights, because *ex hypothesi* his rights in X after the first mortgage to B cannot be called "*property*."

Secondly, for similar reasons it would follow *a fortiori* that the rights of B under his mortgage of 1883 not being "*property*" within the meaning of ss. 5 and 6 of the Transfer of Property Act, he could not transfer them either by assignment or sale or by executing a sub-mortgage.

A more restricted meaning of the word "*property*" than I have adopted would, in my humble opinion, necessitate both these results; and I venture to say that I am wholly unaware of any authority in the Indian Law of mortgages as it stood before the Transfer of Property Act (IV of 1882), or as it now stands since the enforcement of that enactment, to justify the view that either second or or other subsequent mortgages or sub-mortgages are prohibited by the law. And if I am right so far, it follows that a second mortgage or a sub-mortgage is either legal or illegal. If such transactions are illegal, then a clear answer is obtained. But if it be accepted that they are legal and valid, as I hold them to be, then it follows that these transactions, falling under the category of the law of contracts, must be governed by the general principles of the Indian Contract Act (IX of 1872), as indeed expressly stated in s. 4 of the Transfer of Property Act itself, which lays down *inter alia*

that "the chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872."

There is *nothing* in either of these enactments to prohibit a mortgagor after his first mortgage to deal with his rights by transfer in any form in which he chooses to alienate them. Nor is there anything in those enactments to render such subsequent transfers unenforceable at the instance of the transferee, that is to say, in the case of a second mortgage, for example, the second mortgagee would have the right to enforce the obligations contained in the covenants of his mortgage deed.

There is, however, one point which, with reference to the covenants against alienation as contained in Hari Parsad, defendant's three mortgages dated the 10th September 1882, the 23rd February 1884, the 12th August 1885, and Matadin Kasodhan's mortgage of the 6th August 1885, as also in Mata Prasad's mortgage of the 25th August, 1885, assumes importance, *viz.*, whether such covenants against alienation absolutely debar the mortgagor from dealing with his rights by way of transfer of the mortgaged property. The plea was actually taken by Hari Prasad in his defence to the action in the 2nd paragraph of his written statement. This question was one of the subjects of consideration by me in *Ali Hasan* v. *Dhirja* (1), and I expressed my views upon it at pp. 523 and 524 of the report. I ended my observations by saying—

"I am therefore of opinion that transfers made in breach of covenants against alienation—covenants so often introduced in mortgage deeds and so often infringed by mortgagors in this country—are valid except in so far as they encroach upon the rights of the prior mortgagee, and that, with this reservation, such covenants do not bind the property so as to prevent the acquisition of a valid title by the alienee."

This view of the law is stated by Dr. Rash Behari Ghose in the second edition of his well known work on the *Law of Mortgage in India* (page 157), and he sums up the case law in the following words:—

(1) I. L. R., 4 All., 518.

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"It is necessary to observe that at one time the Courts used to give full effect to a condition against alienation (see the cases cited by the reporter in the note to *Chunni* v. *Thakoor Dass* (1); but it is now settled that a transfer by the mortgagor in breach of a condition against alienation is valid, except in so far as it encroaches upon the right of the mortgagee to realize his security. But, with this reservation, such a condition does not affect the property so as to prevent the acquisition of a valid title by the transferee of the equity of redemption. Covenants against alienation are often introduced in mortgage deeds in this country, and, I may add, are so often infringed by mortgagors. But such a covenant, although it may a create a personal liability between the mortgagor and the mortgagee, does not render an alienation absolutely void, but voidable only in so far as it is in derogation of the rights of the mortgagee. In reality, therefore, a mortgagee does not, by virtue of such a covenant, acquire any higher rights than he would acquire even if the condition was absent, except, perhaps, as regards the necessity of making puisne claimants parties [*Radha Prasad Misser* v. *Monohur Dass* (1); *Chunni* v. *Thakoor Dass* (2); *Ali Hasan* v. *Dhirja* (3)]. To these cases I may add the ruling of the Madras High Court in *Venkata Somayazulu* v. *Kannam Dhora* (4) and cite the authority of the various cases mentioned at p. 293 in *Macpherson's Mortgages* (7th ed.), where the rule laid down is that alienations made by a mortgagor in breach of a covenant against alienation are bad only in so far as they interfere with the rights of those with whom the agreement not to alienate was made. And this rule is stated to be as old as the Full Bench ruling of the Calcutta Sudder Court in *Ubhy Charn Sheikhdar* v. *Jugal Kishore Ruee* (5), which was followed in later cases."

Applying these principles to the facts of the present case, it follows that notwithstanding the mortgages of the 10th September 1882, and the 23rd February 1884, in favor of the defendant Hari Prasad, both of which contained covenants against alienation, the

(1) I. L. R., 1 All., 126. (3) I. L. R., 4 All., 518.
(2) I. L. R., 6 Calc. 317. (4) I. L. R., 5 Mad., 184.
(5) Calc. S. D. A., 1848, 305.

mortgagor Kazim Husain was legally entitled to execute subsequent mortgages, as he did by the deed of the 6th August 1885, in favor of the plaintiff Mata Din Kasodhan, and by the deed of the 21st August 1885, in favor of the plaintiff Mata Prasad. Now, if these two latter deeds were valid contracts, as I hold them to be, they must be enforceable by suit in the Courts of justice. And if they are so enforceable, the right of the mortgagees to bring what was mortgaged to them to sale cannot be denied according to the terms of the contract, it being of course borne in mind that what was mortgaged to them was subject to prior incumbrances as I have already described. Such is the effect of the rule as stated at p. 290 of Macpherson on Mortgages (7th ed.), where the learned author on the authority of numerous rulings says—

"And the mortgagor may either transfer absolutely or mortgage his remaining interest in lands which he has already mortgaged without first redeeming them. The purchaser or mortgagee acquires the rights or interests of the mortgagor and stands in his place: he takes the property subject to the lien of the prior mortgagee, the habilities of the property not being affected by any subsequent transfer which the mortgagor can make. And no act of the mortgagor, nothing, in fact, but a revenue sale, can injure the mortgagee's lien on the land; or on that which represents the land."

It has, however, been contended that the mere existence of prior incumbrances debars these plaintiffs who are puisne mortgagees from enforcing their remedy according to the terms of their mortgage deeds, without the consent of the prior mortgagee as such, or without redeeming the prior incumbrances. It has been argued that this restriction upon the plaintiffs' right to bring the property mortgaged to them to sale arises out of the doctrine of priority of liens as understood in the Indian Law of mortgages. That such restrictions do not arise out of any terms or covenants contained in the plaintiffs' mortgage deeds seems to me to be clear, and I will now consider whether the doctrine of priority as understood in our law subjects puisne mortgages to any such restrictions as are sought to be imposed upon them by the argument which I have mentioned.

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Now, mortgage being only a form of the transfer of immovable property, the rule formulated in s. 48 of the Transfer of Property Act comprehensively describes the scope of the doctrine of priority, and it applies to mortgages as much as to other kinds of transfers. The section runs as follows :—

"Where a person purports to create by transfer at different times rights in or over the same immovable property, *and such rights cannot all exist or be exercised to their full extent together*, each later created right shall, in the absence of a special contract or reservation binding the earlier transferees, be subject to the rights previously created."

In considering this section the words which I have emphasized are by no means unimportant, for they show that the rule of priority applies only where the rights of the prior transferee clash with the rights of the puisne transferee, and that such right of priority does not give to the prior transferee a free hand to deal with the puisne transferee's rights in any manner going beyond what is requisite to fulfil and protect the rights of the prior transferee. In other words, where the terms or covenants of a puisne transfer can be enforced without in any manner affecting the rights of the prior transferee, the terms of the puisne transfer must take effect, irrespective of the wishes of the prior transferee, because in such a case the doctrine of priority does not come into play and the maxim "*Qui prior est tempore, potior est jure*" upon which it is based has no reference. This view of the law is applicable as much to transfers by mortgage as to other forms of transfer of immovable property, and therefore my answer to the second question, as enunciated by me, is that so long as the enforcement of the puisne mortgage cannot in any manner affect injuriously the rights of the prior mortgagee, such prior mortgagee is not entitled to prevent the enforcement of the terms of a valid puisne mortgage, to which he was no party and which cannot defeat or in any manner operate in derogation of his prior mortgage security.

I may explain my meaning by taking an illustration. A, the owner of certain immovable property, hypothecates the same by

simple mortgage to B in 1883 as security for payment of Rs. 5,000 payable at the end of 25 years. In 1884 he executes a second simple mortgage of the same property in favor of C in lieu of Rs. 4,000 payable at the end of 15 years; and in 1885 he executes a similar mortgage of the same property in favor of D for Rs. 3,000 payable at the end of 3 years. In this illustration it will be observed that B's mortgage would fall due in 1908, C's mortgage in 1899 and D's mortgage in 1888. All the mortgages remaining unpaid, D comes into the Court seeking to recover his mortgage money by enforcement of his security without waiting for the lapse of the terms of the two prior mortgages and without seeking to redeem them. The question then arises whether he can maintain such a suit?

Now, s. 67 of the Transfer of Property Act distinctly declares that "in the absence of a contract to the contrary, the mortgagee has, at any time after the mortgage money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage money has been paid or deposited as hereinafter provided, a right to obtain from the Court an order that the mortgagor shall be absolutely debarred of his right to redeem the property, or an order that the property be sold." Clause (*a*) of that section leaves no doubt that in the case of a *simple mortgage* the only remedy available to the mortgagee for recovery of his mortgage money is to bring the mortgaged property to sale under a decree of the Court, for he could not sell it himself without the intervention of the Court as explained by me in *Kishen Lal* v. *Ganga Ram* (1).

It will be observed that the section, whilst conferring, upon a simple mortgagee the right of bringing the property to sale, does not either limit it to *first* mortgagees or otherwise qualify such right by saying that a puisne simple mortgagee must either delay the enforcement of his security till the lapse of the terms of prior mortgages or that the redemption of such prior mortgages is a condition precedent to the enforcement of the puisne mortgage. Nor do I think that any such qualifications or restrictions can be imported into the section.

(1) I. L. R., 13 All., 28 (at p. 48).

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For I take it as an established rule of interpretation that when a statute has expressly conferred a right, such right cannot be qualified, restricted or defeated unless such qualification, restriction or defeasance is to be gathered from the provisions of the same statute or of other statutes *in pari materiâ*.

And if this is so, it becomes important to examine closely the various sections of the Transfer of Property Act which have been cited in support of the proposition that, in the case of a simple mortgagee whose mortgage is puisne to prior mortgages, the right of sale conferred by section 67 of the Act restricts that right by rendering the redemption of prior mortgages a condition precedent to the exercise of the right.

Now, the first section to which reference may be made is section 71 of the Transfer of Property Act which runs as follows :—

"Any second or other subsequent mortgagee may, at any time after the amount due on the prior mortgage has become payable, tender such amount to the next prior mortgagee, and such mortgagee is bound to accept such tender and to give a receipt for such amount; and (subject to the provisions of the law for the time being in force regulating the registration of documents) the subsequent mortgagee shall, on obtaining such receipt, acquire, in respect of the property, all the rights and powers of the mortgagee as such, to whom he has made such tender."

That this section confers a right upon puisne mortgagees to pay off prior mortgages cannot be doubted, nor do I think there can be any doubt that such right is limited to the immediately prior mortgage as indicated by the phrase "*the next prior mortgage*" used in the section. Further, I may say that the rights thus conferred upon the puisne mortgagees cannot be exercised under the section till after "the amount due on the next prior mortgage has become payable," that is to say, such right cannot be exercised either in respect of a first mortgage where there are intervening mortgages, nor before the lapse of the term of the mortgage immediately prior to the puisne mortgage. But more important than either of these points is the effect of the word "*may*" as it occurs in the earlier part of the

section, where the right to pay off prior mortgages is mentioned. I understand that word to mean an option as distinguished from what might have been the effect of the word "*shall*," if that word had been there employed, as it usually is where the Legislature intends to make an imperative mandate. The result of this view is that the right of paying off prior mortgages conferred upon puisne mortgagees in s. 74 is an optional right which they may or may not exercise at their choice; and it follows that the provisions of the section cannot operate as a qualification or restriction of the right to bring the mortgaged property to sale conferred upon all simple mortgagees by s. 67 of the Transfer of Property Act.

The next section to be considered is section 75 of the Act which runs as follows:—

"Every second or other subsequent mortgagee has, so far as regards redemption, foreclosure and sale of the mortgaged property, the same rights against the prior mortgagee or mortgagees as his mortgagor has against such prior mortgagee or mortgagees, and the same rights against the subsequent mortgagees (if any) as he has against his mortgagor."

Now, in this section I fail to see any qualification or restriction of the right to bring the property to sale which section 67 of the Act confers upon simple mortgagees without limiting that right to first mortgagees. That right of sale belongs as much to *puisne* and *mesne* simple mortgagees as to the first simple mortgagee, subject of course to the rule of priority enunciated in section 48 of the Act, the exact scope of which rule I have already discussed. All that section 75 of the Act lays down is well illustrated in Mr. Justice Shephard's commentary on that section (2nd ed., p. 288), where he says—

"Thus when A has mortgaged the property successively to B, C and D; C and D have against B, and D has against C, the same rights as A has under the several mortgages against B, C and D; while C has against D the same rights as he has against A. That is to say, the later can redeem the prior mortgagee; and exercise the right of foreclosure or sale against any mortgagee posterior to him. In the case of a prior *versus* later mortgagee the former has the

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right which the mortgagee possesses against the mortgagor,and may consequently sue for foreclosure or sale; since the later mortgagee, having taken as his security the right of redemption, occupies the position of the mortgagor."

In my opinion this illustration correctly explains the entire scope and effect of the section; but that effect falls far short of sustaining the proposition that the payment of a prior incumbrance is a condition precedent to the enforcement of a puisne or mesne simple mortgage or that such puisne or mesne mortgagee is bound to wait for enforcement of his security till the lapse of the term when the prior mortgages become redeemable. It equally falls short of sustaining the proposition that where there are several successive mortgages of the same property any mortgagee whether prior, puisne or mesne is bound before he can enforce his security to seek the liquidation of all the mortgages then subsisting upon the property, regardless of the amounts, nature and the period when such mortgages fall due. In short, I understand the effect of s. 75 to be that each successive mortgagee has the right to enforce his security according to its terms, subject to the rules of priority, and that, in addition, he may redeem prior mortgages if he likes, and if he does not prefer to adopt that course he may proceed with his rights against the puisne incumbrancers, and the mortgagor.

And I may here say in passing that I put a similar interpretation upon the provisions of s. 91 of the Act, so far as they relate to the rights of the puisne mortgagees, to maintain suits for redemption of prior mortgages, with this distinction that whilst the right to pay off a prior mortgage under s. 74 of the Act is limited to the immediately prior mortgagee, the right to *sue* for redemption under s. 91 is not restricted and applies to the redemption of all prior mortgages, subject, of course, to the covenants in such mortgages as to the time when they would be redeemable. This is apparent from the provisions of s. 60 of the Act. But notwithstanding this distinction two points remain, *viz.*, that the puisne mortgagee cannot, any more than the mortgagor himself, enforce redemption before the time when the mortgage is redeemable and

that neither is under the imperative necessity of seeking redemption. Their omission to redeem would of course bring with it its natural legal consequences: in the case of the mortgagor the extinguishment of such rights as may have been left to him in the mortgaged property after the execution of the mortgage security which may be enforced, and in the case of a puisne mortgagee the loss of his security by reason of the enforcement of a prior mortgage which, though falling due, he did not choose to redeem to prevent sale under the prior mortgage.

But whilst this is so, it is one thing to say that if the right of redemption, whether under sections 74 and 75 or under section 91 of the Transfer of Property Act, is not exercised in due time, the puisne mortgagee may lose his security altogether: it is a totally different thing to say that the redemption of prior mortgages is a condition precedent to the enforcement by the puisne simple mortgagee of the right to bring the mortgaged property to sale in enforcement of his security—a right, which, as I have already said, has been conferred upon him in express and unqualified terms by section 67 of the Transfer of Property Act.

I am therefore unable to regard anything either in sections 74 and 75 or in section 91 as enjoining any qualifications or restrictions upon the right to sell which section 67 of the Transfer of Property Act declares in favor of all simple mortgagees without any restriction as to whether they are first, mesne or puisne mortgagees.

Where then is the authority in that statute or in any other for holding that a puisne simple mortgagee's right to bring the property to sale is subject to the condition that he should either wait for the lapse of the term of the prior mortgages or that the redemption of such prior mortgages is a condition precedent to the enforcement of his security?

The section of the Transfer of Property Act upon which stress has been laid is s. 85, which runs as follows:—

"Subject to the provisions of the Code of Civil Procedure, s. 437, all persons having an interest in the property comprised in a

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mortgage must be joined as parties to any suit under this chapter relating to such mortgage: Provided that the plaintiff has notice of such interest."

Before stating the exact effect of that section, as I understand it, upon the rights of a puisne simple mortgagee to bring the mortgaged property to sale, or to redeem prior mortgages, I may premise that I regard that section as enunciating no rule of substantive law but only a rule of procedure for suits for foreclosure, sale and redemption instituted under Chapter IV of the Transfer of Property Act. I make this observation at the outset; and before passing on to the consideration of other points I am anxious to explain my views as to the effect of the word "*must*" as it occurs in s. 85 in the clause saying that: "all persons having an interest in the property comprised in a mortgage must be joined as parties to any suit under this chapter relating to such mortgage."

Now, whatever may be the literal meaning of the word "*must*" in the English tongue, I have no doubt that, whilst it may be understood as more than merely *directory* and representing as strong an *imperative* mandate as the word "*shall*," when used in statutes, it does not convey the force in legal interpretation which is given to express prohibitions as to the action of the parties to a litigation or of the Courts of Justice. The word itself, however imperative, is affirmative in its effect and meaning, and however imperative such affirmative meaning may be, the statute law when interpreted draws a vast distinction between imperative affirmative mandates and negative words of prohibition. Actions which fall short of full compliance with affirmative rules whether merely directory or imperative are no doubt reprehensible, but they amount to only defects of procedure which can be remedied, whilst acts done in contravention of express legislative prohibition are *ultra vires*, illegal and without jurisdiction. I have already indicated that no such words of prohibition are to be found in s. 85 of the Transfer of Property Act, and I cannot therefore read that section as if it began by saying: "*No suits shall be entertained unless all the parties etc.*" The section, as it stands, seems to me to be nothing more than a corollary to the

principles contained in the various sections of the Code of Civil Procedure as to the array of parties to a civil suit, and beyond this I am unable to carry the effect of the rule as indicated by the section itself. That is to say, I cannot understand the rule as affecting the substantive incidents of valid mortgages except in the sense of mere procedure which must be clearly distinguished from substantive rights. Nor can I take it as justifying the importation of any qualifications of the right of sale which simple mortgagees, whether first, puisne, or mesne, possess under s. 67 of the Act, subject, of course, to the rule of priority as enunciated in s. 48 of the Act.

But it has been contended that the effect of the section goes far beyond my interpretation, that its provisions require that when a *puisne* or *mesne* simple mortgage seeks by suit to enforce his security by bringing the mortgaged property to sale, he is bound, as conditions precedent to the enforcement of his security, *firstly*, to pay off the prior mortgages, *secondly*, to wait for the expiry of the period when such prior mortgages become redeemable, and *thirdly*, to require that all the subsisting mortgages, whether *prior* or *puisne*, should be liquidated and brought into account in Court as if the suit was one for administration of an estate or the winding up of a company.

As I understand the argument, it amounts to this, that where a mortgagor has, by several successive mortgages, of the same property, borrowed money at various times and on various conditions, including various terms as to the periods when the mortgages would be redeemable, it is not a matter of choice with any one of the *puisne* or *mesne* incumbrancers, but a matter of legal mandate, that he should, in seeking to enforce his own security against such rights as were mortgaged to him, seek to free the property of all prior and subsequent incumbrances and bring to sale the full ownership of the property free of all incumbrances, so as to give a clear title of full ownership to the purchaser who buys the property in the auction sale which would thus take place. And, in support of this view, certain observations to be found in Dr. Whitley Stokes' introduction to the Transfer of Property Act (*The Anglo-Indian Codes*, Vol.

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I, p. 734) were referred to. I have read those observations with all the respect due to an author of such eminence, and all the more so, as it is a matter of the history of legislation in India that the Transfer of Property Act practically owes its existence to the juristic labors of the illustrious author when occupying the high position of Legal Member of the Viceroy's Legislative Council. But those observations do not go the length of the contention with which I am now dealing.

Under the law as it stood before the passing of the Transfer of Property Act (IV of 1882) much doubt and uncertainty existed as to who were the proper parties to a suit in which a prior, puisne, or mesne mortgagee sought to enforce his simple mortgage by bringing the property to sale. The ordinary course adopted by such a simple mortgagee, at least in this part of the country, was to sue only the mortgagor and to pray for enforcement of his security against the mortgaged rights, ignoring the existence of puisne incumbrancers and other persons interested in the property. Such suits resulted in decrees, where the plaintiff's mortgage was proved, in his favor resulting in sales, without giving those interested in saving the property any opportunity of paying off the plaintiff's mortgage and securing their rights from sale. I dealt with this matter in delivering my judgment in *Sita Ram* v. *Amir Begam* (1) where I said:—

"The law, as it stood before the Transfer of Property Act, as to the necessity in a suit by a first mortgagee of making a subsequent mortgagee a party was explained by me in *Ali Hasan* v. *Dhirja* (2) following the ruling of Turner, J., in *Khub Chand* v. *Kalian Das* (3). It was there held that it was not absolutely necessary to make puisne incumbrancers parties to a suit by a first mortgagee, and that a sale in enforcement of the prior mortgage would defeat the rights of the puisne incumbrancer, who is presumed in jurisprudence to take with knowledge of the prior mortgage, or at least cannot take more than his mortgagor had to give. The puisne incumbrancer

(1) I. L. R., 8. All., 324 (at p 339). (2) I. L. R, 4. All., 518.
(3) I. L. R, 1. All., 240.

could, of course, escape the decree by proving fraud or collusion, or he might prevent the sale in enforcement of the prior incumbrance by redeeming it. But if neither condition is satisfied, sale in enforcement of the prior incumbrance would defeat the puisne incumbrance. Since the passing of the Transfer of Property Act (IV of 1882) it seems, under certain conditions, necessary, according to s. 85 of the Act, to make puisne incumbrancers parties, with the result that if they do not redeem, their lien will be defeated in the absence of fraud, which might disturb the rule of priority under conditions such as those contemplated by s. 78 of the Transfer of Property Act (IV of 1882)." This matter was more fully considered by me in *Bhoop Singh* v. *Goolab Rai* (1) where I made the following observations which have not been published in the official reports and they are these :—

"Such being the effect of the rulings of the other High Courts, it is important to consider how this Court has dealt with the same question in regard to suits brought to enforce the mortgage lien by sale of the mortgaged property, such as the plaintiff's former suit of the 24th April 1882, was, and to which only Bhajwant as the heir of Dalganjan Singh (the executant of the mortgage of the 28th April 1870), and Jagraj as the purchaser of the property under his own decree of the 14th August 1873, were impleaded. In the Full Bench case of *Khub Chand* v. *Kalian Das* (2), it was laid down by Turner, J., that when a suit is brought to enforce the lien under the mortgage, though it is not absolutely necessary for the plaintiff to make subsequent incumbrancers parties to the suit, and though if subsequent incumbrancers are not made parties to the suit, they are not bound by the decree which the plaintiff may obtain, and may at any time before sale come in and redeem, yet if they do not redeem, and a sale takes place, their liens will be defeated, unless they can show something more than the existence of their subsequent incumbrances, some fraud or collusion which entitled them to defeat the first incumbrance, or to have it postponed to their own. The principle of the rule was followed by me in *Ali Hasan* v.

(1) Weekly Notes, 1886 p. 269 (at p. 271).
(2) I. L. R., 1 All., 240.

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Dhirja (1); and again in a very recent case—*Seeta Ram* v. *Wilaiti Beyam* (2) in respect of a sale which had already taken place in execution of a decree enforcing hypothecation liens. Such has undoubtedly been the course of decision in this Court, and is in accord with the principle upon which the ruling of the Calcutta High Court in *Mathura Nath Pal* v. *Chander Money Dabya* (3) proceeded, and is in special conformity with the dictum of West, J., in. *S. B. Shringarpuri* v. *S. B. Pethe* (4), where that eminent Judge observed that 'It was not incumbent on the registered mortgagee, desiring to enforce his lien, to search for subsequent incumbrancers or purchasers. It lay on them to inform him of the assignment of the equity of redemption or of the interest they had acquired. Registration of a subsequent sale did not supply the place of such notice, as the mortgagee, though he would properly look for prior incumbrancers, could not be expected to keep up a constant search for those subsequent to his own, and in the absence of notice, would properly proceed against the person *primâ facie* liable to him. And if his proceeding was right, the title acquired under it was complete so as to displace the defendant's title.' Both these cases were referred to, and dissented from by the Madras High Court in *Venkata Samayazulu* v. *Kannam Dhora* (5) to which I have already referred; and I confess that, in view of this conflict of authority, I have, in considering this case, had much doubt as to whether I could still adhere to the dictum of Turner, J., in *Khub Chand* v. *Kalian Das* (6) which I followed with the concurrence of my brother Judges on more than one occasion, in the cases which I have already mentioned But I do not think it is necessary for me to decide this question, because, whatever the rule of law may have been before the passing of the Transfer of Property Act (IV of 1882), the matter which has given rise to so much conflict of decision has now been settled by the Legislature in s. 85 of that enactment, where it is laid down that 'all persons having an interest in the property comprised in a mortgage, must

(1) 1 L. R., 4. All, 518.
(2) Weekly Notes, 1886, p. 101.
(3) I. L. R., 4. Calc., 817.
(4) I. L. R., 2 Bom., 662.
(5) I. L. R., 5 Madras, 184.
(6) I. L. R., 1 All., 240.

be joined as parties to any suit under this chapter relating to such mortgage: provided that the plaintiff has notice of such interest.' The Act must now be taken to have approved of thos erulings which require that all persons having an interest in the mortgaged property, must be joined in a suit, such as the former suit of Gulab Rai, instituted by him on the 24th April 1882, and although that suit was instituted before the Transfer of Property Act came into force, I am prepared to follow the rulings which s. 85 of the Act has approved, even though such a view may involve modification of the opinions which I adopted in the two cases already mentioned."

Such, then, was the law as to the array of parties in suits for enforcement of simple mortgage securities and gave rise to multiplicity of suits as to the rights claimed and enforced under *one and the same* mortgage, and as to the title which the auction purchaser in sales held in enforcement of such mortgage acquired as against other incumbrancers and other persons interested in the property sold. The legislature has removed this evil, and the law has now been placed upon a sounder footing by s. 85 of the Transfer of Property Act as to the array of parties in suits such as the present. The effect of that law so far as the impleading of puisne incumbrancers is concerned is the subject of a very recent ruling of my brother Straight in *Namdar Chaudhri* v. *Karam Raji* (1) where he, with the concurrence of my brother Tyrrell, laid down the rule that "if a prior incumbrancer having notice of a puisne incumbrance, does not, when he puts his mortgage in suit, join the puisne incumbrancer as a party, that puisne incumbrancer is in no way affected or prejudiced by the decree in the rights which the Transfer of Property Act gives him to redeem the prior incumbrancer. If he has been left out of that litigation, the puisne incumbrancer must be placed in the same position he would have held had he been a party to that litigation."

In this view of the law I concur. But it does not go the length of holding that, where a suit has been improperly or defectively instituted in respect of the array of parties required by s. 85

(1) I. L. R., 13 All., 315.

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of the Transfer of Property Act, such suit is to be defeated merely because of such defect, or that when such a suit has actually gone to trial and resulted in a decree, such decree is null and void as *ultra vires*. Much less does the ruling lay down any rule which could be understood to necessitate that when a suit is instituted by a mesne or puisne mortgagee for enforcement of his security by sale, and the prior mortgagee or mortgagees or other persons interested in the property are left out of the array of parties, the suit must fail.

I may now say, before proceeding any further, that I concede that s. 85 of the Transfer of Property Act requires, that to a suit by a mesne or puisne incumbrancer, both the prior and subsequent mortgagees must be made parties, so as to have an opportunity of contesting the genuineness, validity or extent of the plaintiff's rights under the particular mortgage which he seeks to enforce, and also to assert and vindicate such rights as they may have as between the plaintiff on the one hand, and themselves on the other. The section would in such cases require the plaintiff to implead as defendants (1) the mortgagor, (2) the prior mortgagees, (3) the mortgagees puisne to his incumbrance, and (4) other persons interested in the property which the plaintiff seeks to bring to sale by enforcement of his security. The effect of an adjudication in a suit thus arrayed would be that if the plaintiff succeeded in obtaining a decree for enforcement of his security, such decree would define his rights and be binding upon all parties defendants, and when a sale takes place in enforcement of the decree such sale would convey to the auction purchaser a title unhampered by any possibility of being subsequently questioned by any one of the parties to the litigation. This is obviously a great benefit conferred by the section, but I do not think it aims at anything more.

It has been, however, argued that the section goes much further, for there would be no object in requiring such an array of parties unless the Legislature intended that when any mortgage is put in suit all other mortgages should be taken into account and liquidated so as to free the property from all incumbrances and render the sale

in enforcement of any security free ofall charges so as to pass a clear title of full unencumbered ownership to the purchaser.

I will deal with this argument in two aspects. I will show in the *first* place that the array of parties required by the section has substantial benefits in preventing subsequent litigation, without subjecting the mesne or puisne incumbrancer to the necessity of paying off prior mortgages or bringing into account all incumbrances as a condition precedent to the enforcement of his security. In the *second* place, I will show that our rules of procedure contain no provision for determination of disputes as to priority or otherwise which may arise *inter se* between several mortgagees who, under s. 85, must necessarily be impleaded on *one and the same side* as parties defendants. For under the Code of Civil Procedure no two mortgagees seeking to enforce separate mortgages could join as plaintiffs in one and the same suit (s. 31), nor can any one be added as a plaintiff against his will (s. 32) though he may be added as a defendant so long as any relief is claimed against him, "and judgment may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities, without any amendment."

Dealing, then, with the first aspect: in a suit by a mesne mortgagee for enforcement of his security, the parties being arrayed as abovementioned, under s. 85 of the Transfer of Property Act, the mortgagor, who has to defend his rights of ownership in the property, will have the chance of contesting whether the security which the plaintiff seeks to enforce is genuine and valid, whether the amount claimed thereon is correct or has been reduced by subsequent payments. Similarly, the incumbrancers puisne to the plaintiff could raise any pleas to the same effect (for such right is given to them by s. 75 of the Transfer of Property Act) and they would further in common with the mortgagor (under s. 88 read with s. 86) be allowed an opportunity of redeeming the plaintiff's mortgage to prevent the property from being brought to sale in enforcement of the plaintiff's security—thus obviating the evils of a fresh litigation as pointed out by my brother Straight in *Namdar*

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Chaudhri v. *Karam Raji* (1). Now, this is obviously a great improvement upon the law as it stood before s. 85 of the Transfer of Property Act, and it will be readily observed that neither the terms of that section nor the exigencies of the advantage thus derived therefrom require that puisne incumbrancers to whom the right and opportunity of redemption is thus given should bring their mortgages into account, before the mesne incumbrancer, who is prior to them, can enforce his security. I can imagine and know many cases in which such puisne incumbrancers are either debarred by the terms of their mortgages from seeking recovery of the money due thereon, or are unwilling to forego the security which they already possess and which they wish to keep, preferring to pay off the prior mortgage to closing the benefit of their investment, and I am unable to understand anything in the section which would force them to do so at the will of the prior incumbrancer, or that of mortgagees puisne to them.

The advantages of impleading prior mortgagees, as required by the section, are equally great. In a suit by a puisne mortgagee it may be that he denies the validity or genuineness of the prior mortgage, or by ignoring its existence assumes that such a mortgage has already been paid off and is no longer subsisting. It may also be that whilst admitting the prior mortgage he contests the amount remaining due thereupon as a charge upon the mortgage property which would take precedence of the plaintiff's security by reason of the rule of priority as enunciated in s. 48 of the Transfer of Property Act. And, indeed it may also be, as I have known in numerous cases, that the mesne or puisne incumbrancer contends that although his security is puisne in point of time to that of the prior mortgage, yet the security possessed by such prior mortgagee must be postponed to the plaintiff's security, because the latter advanced money in consequence of the fraud and collusion of the prior mortgagee. By saying this, I mean that in mortgage suits by mesne or puisne incumbrancers in India it is not an uncommon plea, based, as it is, upon the doctrine explained in s. 78 of the Transfer of Property Act, which lays down that "where, through the fraud, misrepresentation

(1) I. L. R., 13 All., 315.

or gross neglect of a prior mortgagee another person has been induced to advance money on the security of the mortgaged property, the prior mortgagee shall be postponed to the subsequent mortgagee." On the other hand, there are cases in which a prior mortgagee, after the property has been mortgaged to a second mortgagee, makes further advances upon the same property and pleads that he made such advances by reason of the fraud and misrepresentation of the puisne incumbrancer in collusion with the mortgagor, and upon that ground claims priority, not only in respect of sums advanced upon the prior mortgage but also in respect of such advances as were made upon a mortgage subsequent in point of time to the security which the plaintiff, the puisne or mesne mortgagee, seeks to enforce. Further, there are cases of which this very case affords an illustration, *viz.*, cases, in which the prior incumbrancer dealing direct with the mortgagor and behind the back of the mesne and puisne incumbrancers, purchases such rights of ownership as were left to the mortgagor after the execution of the various mortgages.

The preclusion of points such as these being raised by the prior mortgagee in any litigation which might ensue after the mesne or puisne incumbrancer has already obtained his decree, and that decree has resulted in a sale at which a third party has purchased is one of the important objects which s. 85 of the Transfer of Property Act aims at by requiring that the prior mortgagee should also be impleaded in such a cause. His being so impleaded would also give him an opportunity of expressing his consent in suits by puisne incumbrancers to the effect that the sale in enforcement of the puisne incumbrance may take place free from his prior incumbrance under conditions provided by s. 96 of the Transfer of Property Act, which appears to me distinctly to contemplate sales in enforcement of puisne mortgages subject to prior incumbrances. A prior mortgagee who had no such defences to raise would naturally not appear to contest the suit of the mesne or puisne incumbrancer, for unless such suit assails the genuineness, validity or amount due upon the prior mortgage, he has no reason to defend the suit, for whatever decree may be passed upon a mesne or puisne incumbrancer's suit

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as to the sale of the property, such sale could not affect the interests of the prior mortgagee.

These considerations seem to me to furnish ample explanation of the expediency which induced the Legislature to make the provisions contained in s. 85 of the Transfer of Property Act as a rule of procedure guiding the array of parties in such mortgage suits. But there is nothing in that section, as I understand it, to render it necessary that at the choice and at the suit of any one of several mortgagees of the same property, all the mortgages are to be called into account, the prior mortgages are to be paid off, the puisne mortgages are also to be liquidated, and the suit is to be proceeded with, much in the same manner as a suit for the administration of an estate or the winding up of a company.

This leads me to the consideration of the second aspect of this discussion, *viz.*, whether either the Transfer of Property Act or the Code of Civil Procedure furnishes any rules as to the adjudication of disputes in mortgage suits in the manner which must necessarily be required by an argument which maintains that as a condition precedent to the enforcement of a mesne or puisne incumbrance all the subsisting mortgages must be brought into account and liquidated before a sale can take place to satisfy the mesne or puisne incumbrancer who seeks to enforce his security when it falls due without waiting for the terms upon which other incumbrancers, whether prior or puisne to him, advanced money to the mortgagor and the periods when such mortgages would become redeemable. Even assuming, for the sake of argument, that a mesne mortgagee is bound to pay off *prior* mortgages, the question remains how he is to force two or more incumbrancers, *puisne* to his mortgage, to redeem each other or to enforce their respective securities against each other in a suit not instituted by any one of them and in which they are all arrayed on one and the same side as defendants.

It is equally difficult to conceive how in such a suit decrees for redemption or sale could be made as between co-defendants *inter se*,

or, if such decretal orders are inserted in the decree granted to the plaintiff, how such decretal orders are to be enforced by one co-defendant against another who, so far as the plaintiff is concerned, are his judgment-debtors, and as such, liable to the execution of his decree, subject of course to such conditions as have been imposed upon the right decreed to him. And it is needless to say that such conditions can never be such as to leave the decree-holder at the mercy of any or all of the judgment-debtors as to the enforcement of the right decreed. In my opinion this view is not opposed to any principle laid down by the Lords of the Privy Council in *Umes Chander Sircar* v. *Zahur Fatima* (1), which deals with the especial pleadings and facts of that particular case, and does not seem to proceed upon any special provision of the Transfer of Property Act.

Perhaps the best way to deal with this point is to take an illustration and conceive the kind of pleas which may possibly be raised in such a suit, with reference to the hypothesis upon which the argument I am now considering proceeds. The illustration which I take is the following :—

A, the owner of certain immovable property, hypothecates it, that is, executes simple mortgages first in favor of B, then successively in favor of C, D, E, F, G and H. That these successive mortgages are all valid cannot be denied, unless it is held (which as I have already stated cannot be held) that after the execution of one mortgage the mortgagor can no longer deal with his rights of ownership in the mortgaged property by executing a second or other subsequent mortgage. This being so, let me conceive that C, the second mortgagee, seeks to enforce his security by bringing the mortgaged property to sale, that is to say, such rights and interests as were mortgaged to him by A subject to the prior incumbrance of B.

(1) L. L. R., 18 Calc., 164.

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Now in such a suit the provisions of s. 85 of the Transfer of Property Act would require that the array of parties should be the following :—

C (2nd mortgagee)	...	...	plaintiff,		
	v.				
A, mortgagor	...	...	...	defendant	1.
B, 1st mortgagee		...	...	„	2.
D, 3rd „	...	...	...	„	3.
E, 4th „	...	...	...	„	4.
F, 5th „	...	...	...	„	5.
G, 6th „	...	...	...	„	6.
H, 7th „	...	...	...	„	7.

Now, in dealing with a suit such as this, the respective rights of various mortgagees as declared in s. 75 of the Transfer of Property Act must be kept in view, also the provisions of s. 85 of that Act as to the array of parties; and upon the hypothesis of the argument, which I regard as unsound, I will conceive defences which may be raised in such a suit rendering it impossible to be decided under any rules of procedure recognised by our Code (Act XIV of 1882), notwithstanding its amendments. Let me then conceive the following defences :—

(1) A, the mortgagor, either denies that he ever executed the mortgage in favor of C, or pleads that the mortgage has been partly or wholly paid off.

(2) B, the first mortgagee, pleads that the mortgage in favor of C, was illegal and invalid, because in his deed there was a covenant against subsequent alienation by A, the mortgagor, and A the mortgagor had therefore no authority to execute the second mortgage in favor of C, the plaintiff, whilst A, mortgagor, defendant No. 1, denies that he ever executed a mortgage in favor of B, defendant No. 2, or that that mortgage should in any manner be taken into account.

(3) D, the 3rd mortgagee, defendant No. 3, pleads that not only the mortgage in favor of C, the plaintiff, but also the mortgage

in favor of B, the first mortgagee, defendant No. 1, were fraudulent and collusive and without consideration, that therefore he is not to be regarded as the 3rd mortgagee but as the first mortgagee, thus entitled to defeat not only the claim of the plaintiff C, but also to defeat the pretensions of B, who claims to be the first incumbrancer of the property.

(4) The defence of E is that though the mortgage executed by A, the mortgagor defendant No. 1, in favor of the plaintiff C was valid, the mortgage in favor of B, defendant No. 2, who claims to be the mortgagee, was never executed, is not genuine and no money therefore is due upon it, and that his (E's) fourth mortgage was therefore free of any incumbrance such as B, defendant No. 2, asserts.

(5) The plea of F is that all the mortgages executed by A, the mortgagor, in favor of B, defendant No. 1, C the plaintiff, D the third mortgagee, defendant No. 3, E the fourth mortgagee, defendant No. 4, were genuine and valid, but that all these persons through fraud, misrepresentation or gross neglect induced him (F) to advance money on the security of the mortgaged property, and they should therefore be postponed to his (F's) mortgage security for purposes of satisfying his demand under the rule contained in s. 78 of the Transfer of Property Act.

(6) The plea of G, the sixth mortgagee, defendant No. 6, is that the mortgage in favor of the plaintiff C is genuine and valid, but that the mortgages in favor of B, defendant No. 2, D, defendant No. 3, E, defendant No. 4, and F, defendant No. 5, were not valid and no consideration passed upon them, and therefore his (G's) rights are not subject to any of the incumbrances claimed by the abovementioned defendants Nos. 2, 3, 4 and 5.

(7) The plea of H, defendant No. 7, is that, although the plaintiff's mortgage is genuine and valid, yet he cannot enforce his security otherwise than subject to his (H's) mortgage, because in taking the mortgage C, the plaintiff, joined with B, D, E, F and G, in inducing him (H) to believe that the property was free of all

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incumbrance and it was upon such guarantee that he (H) advanced the money.

Such may be the pleas in a suit such as the one which I have conceived as an illustration. I do not wish to complicate the illustration further by saying that, if the pleas of these various defendants also raised questions as to the amount due and paid upon each successive mortgage, the rights of each mortgagee, who being defendant in the cause seeks priority over another, would require a separate issue for determination, which issue, according to the hypothesis with which I am now dealing, could not arise as between the plaintiff on the one hand and the defendant on the other, but would arise between one or more defendants *inter se*.

Similarly, there may be pleas other than those that I have conceived in the illustration, in which the defendants quarrel *inter se* as to the rights which each possesses under his mortgage, and, by the mathematical rule of permutations and combinations a suit of this character might give rise to many more issues as between defendants *inter se* as to their respective rights not only as to priorities and amounts of their lien, but also as to their rights to enforce the redemption of prior mortgages, and also as to enforcement of securities against the puisne incumbrancers.

It would almost be a waste of time to illustrate how such other issues might arise between mortgagees who are all co-defendants and between whom issues arise such as those which I have already indicated. That such issues which are disputes between co-mortgagees *inter se* do not concern the plaintiff C so long as he enforces his security according to the covenants contained therein and subject, of course, to the priorities which may be asserted against him, is obvious; for all that he wants is to enforce a valid contract for recovery of his money by bringing to sale the rights and interests which were mortgaged to him by the mortgagor A, of course subject to such incumbrances as may be proved against him.

So long as the plaintiff's rights are resisted by any one of the defendants, who, in a suit such as I have contemplated in the illustration, should be arrayed in point of parties, (as s. 85 of the

Transfer of Property Act requires) the issue would be one between the plaintiff on the one hand and the defendant or defendants on the other. But the moment issues are raised between the defendants *inter se*, as to priorities of mortgages, as to fraud or collusion, as to the amounts due upon each mortgage, such issues, if they can be so called, are issues for dealing with which the rules as contained in our Code of Civil Procedure are inadequate for purposes of adjudication. Points in dispute between defendants cannot properly be called "*issues*" within the meaning of s. 146 of the Code; nor do the rules of evidence as understood in our law, entitle co-defendants *inter se* to cross-examine each other's witnesses, for the right is limited to parties arrayed on opposite sides of a litigation (*vide* s. 137 and s. 138 of the Evidence Act) and if this is so, it is difficult to see how any issues, which arise between two or more mortgagees as to their conflicting claims in a suit in which all of them are arrayed as defendants, can be brought to trial. If they could be brought to trial, it follows that they could be compromised between the contending co-defendants without the consent of the plaintiff.

It would be nothing other than an unnecessary expenditure of time to explain that in our own Code of Civil Procedure in common with other systems of adjective law which go to the remedy *ad litis ordinationem*, it is only in very few exceptional cases, that, a *lis*, by which word I understand a dispute, is to be adjudicated upon in any manner other than by disposing of it as a dispute between two and only two parties. In other words, a triangular litigation is unknown to our Code of Civil Procedure except where a special provision is made.

If this is so, where is the authority to justify the view, that a suit such as I have contemplated in the illustration can ever be adjudicated upon, as one and the same suit, in one and the same litigation, in which the interests, and pleas of the co-defendants are opposed to each other *inter se*, as distinguished from pleas raised by them jointly or severally against the remedy which the plaintiff C seeks to enforce upon his mortgage security? Further, where is the authority in our British Indian Law that, even if such an adjudica-

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tion could be made upon disputes between defendants *inter se*, such an adjudication would be binding upon them either within the rule of *res judicata* as enunciated in s. 13 of the Code of Civil Procedure, or, within the meaning of s. 40 or 41 of the Indian Evidence Act (I of 1872)? One thing is certain, that so far as the efficacy of judgments or adjudications is concerned as binding upon the parties within the meaning of the rule of *res judicata* as understood not only in the English Law but also in the British Indian Law, it is necessary that the parties who are so held bound must be arrayed on opposite sides in a suit or proceeding framed between those parties. It is equally certain, that where such is not the case, the rule does not apply, and the adjudications are not binding in the sense of preventing the reagitating of the same points in a subsequent litigation. That is to say, in the illustration conceived and the pleas therein represented, as arising between mortgagees *inter se*, who are co-defendants asserting rights of priority over each other, charges of fraud and collusion against each other, each asserting that the amount claimed by one co-mortgagee is more than is due to him, all these disputants being arrayed on one and the same side in the suit of C, as defendants, no adjudication upon such disputes can ever pass *in rem judicatam*. For reasons for this view I need only refer to my judgment in the imperfectly reported case of *Sital Prasad* v. *Bansidhar* (1) which had the concurrence of the late Mr. Justice Brodhurst.

And if that ruling is right, what is the use of making such adjudications between co-defendants as are not binding upon them? The only result would be to delay the remedies to which the plaintiff C, in my illustration would be entitled, without any binding adjudication upon the disputes between the defendants, the other mortgagees, *inter se*.

The Legislature, no doubt, might have provided remedies for such necessary results of procedure, if it so intended, by special legislation. But it is clear to my mind that it would be inexpedient to do so, and that in framing s. 85 of the Transfer of Property Act

(1) Weekly Notes, 1882, p 168.

the Legislature did not intend either to disturb the well recognised principles of the rule of *res judicata*, or to render suits for enforcement of a simple mortgage, suits in which not only the mortgage sought to be enforced is to be brought into question by those who are parties defendants to the cause, but also all other mortgages are to brought into account for purposes of liquidation, and disputes arising among the defendants mortgagees *inter se* are also to be adjudicated upon.

If such had been the intention of the Legislature (an intention which juristic reason would render extremely inexpedient) s. 85 of the Transfer of Property Act would not be the only section in that enactment. For I should have expected a larger number of sections making exceptions to the rule of *res judicata*, and a larger number of sections providing the procedure whereby a triangular dispute is to be adjudicated upon in a case in which a mortgagee, suing to enforce only his security by bringing the mortgaged property to sale, is met by pleas which, so far as his right is concerned, may of course be dealt with as between him and the defendants, but which, so far as they raise disputes between co-defendants mortgagees *inter se*, cannot be disposed of in a binding adjudication between them, and which pleas, so far as the plaintiff is concerned, do not interest him at all; for priorities of lien or other disputes as to amount or otherwise between the defendants mortgagees cannot affect him so long as his security is enforced.

I have dwelt upon this aspect of the case at such length because it shows that s. 85 of the Transfer of Property Act must be read exactly as it stands, and that no notions outside that section are to be imported into it for any view which justifies the argument with which I am dealing, and also to indicate the view that questions of mere procedure which form part of adjective law *ad litis ordinationem* must not be confounded with the rules of substantive law *ad litis decisionem*. I have also dwelt upon this matter in order to show that if the distinctions which are pointed out are not kept in view, the rules contained in our Code of Civil Procedure (Act XIV of 1882), which is a consolidatory enactment, as shown in the pream-

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ble, are as powerless as any rules of procedure contained in the Transfer of Property Act (IV of 1882) to enable adjudication of disputes between co-defendants, where issues are raised between them in a suit by the plaintiff C, the second mortgagee, in the suit which I have taken as an illustration.

It is, therefore, in my opinion certain that, whilst the provisions of s. 85 of the Transfer of Property Act require that all persons interested in the mortgaged property should be made parties to any litigation in respect of any mortgage sought to be enforced, the entire scope of that section is limited to the object that the genuineness, validity and enforcibility of the particular mortgage sued upon should not be called into question in a subsequent litigation; for the simple reason that all those parties would be parties defendants to the very suit in which, in the case of a simple mortgage, the plaintiff C, as in my illustration, would be seeking to enforce his security by sale, and any pleas raised against the remedy which he claims would in that very suit be decided once and for all as between him and the defendants, so as to convey to the purchaser who purchases in an auction sale in enforcement of the plaintiff's security a title unhampered by any objections which could be raised by any one of the parties to the suit.

To carry the effect of the section any further, is to legislate probably upon grounds which are neither contemplated by the Legislature nor amenable to any such practical effect as our rules of Civil Procedure recognise. In cases where there is a large number of mortgagees holding securities upon one and the same property under various terms as to the conditions of the mortgages, including the periods when such mortgages would become redeemable, it would be leaving all the mortgagees to the mercy of any one of such mortgagees if it were to be held that the effect of s. 85 of the Transfer of Property Act is that at the suit and choice of any one of the puisne or mesne mortgagees the property to be brought to sale must be cleared of all incumbrances so as to give a title to the purchaser at such sale free of all incumbrances.

I think I have said enough to show that in the present case s. 85 of the Transfer of Property Act required that the plaintiff Mata Din Kasodhan, in seeking to enforce his security under the simple mortgage of the 6th August 1885, should also have impleaded the puisne mortgagee Mata Prasad, whose simple mortgage-deed is dated the 21st August 1885, in order to enable him to exercise the right of redemption conferred upon him by s. 75 of the Transfer of Property Act to save the property from sale in enforcement of the plaintiff's security. Mata Prasad, however, was not impleaded in the suit as defendant in the cause, and this undoubtedly was a defect in the array of parties in such a suit if the plaintiff Mata Din Kasodhan had notice of Mata Prasad's puisne incumbrance within the meaning of s. 85 of the Transfer of Property Act. There is, however, no allegation in the defence to the effect that the plaintiff Mata Din Kasodhan had any such notice, and naturally there is no trace of any plea in defence objecting to the suit upon the ground of want or defect of parties. Not only was such a plea not raised in the Court of first instance, but was not raised in the lower appellate Court. If it had been so raised, it could easily have been remedied by the addition of the name of Mata Prasad (the plaintiff in the connected suit) under s. 32 of the Code of Civil Procedure as a defendant to the suit, and the defect would have been remedied. It was, however, not so remedied, and the suit went to trial resulting in a partial decree of the claim, which decree has been upheld by the lower appellate Court. Under these conditions, the question is whether the suit should be absolutely defeated?

This question is simply a question of procedure and practice, and I think I am within the authorities not only of the Courts of Justice in India but also of the practice of the Courts in England in saying, that such objections if not taken at the earliest stage in the Court of first instance and are foregone there, cannot be taken for the first time in a Court of appeal, much less in a Court of second appeal such as this Court. This indeed is the effect of s. 34 of the Code of Civil Procedure (Act XIV of 1882), which if for no reason other than the fact that it is a later statute should govern

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s. 85 of the Transfer of Property Act (IV of 1882), both sections being in *pari materiâ*. And if this is so, the defect of parties caused by the absence of Mata Prasad will not defeat the action altogether. Indeed, so far as Mata Prasad himself is concerned, he can have no reason to complain, for, according to the ruling of my brethren Straight and Tyrrell in *Namdar Chaudhri* v. *Karam Rai* (1) his right of redemption, &c., cannot be affected by the decree in the suit, and further, considering that his connected suit was tried by both the lower Courts along with the suit of the plaintiff Mata Din Kasodhan, he (Mata Prasad) had ample opportunity of applying under s. 32 of the Code of Civil Procedure to be added as a defendant to this suit, of which opportunity he never took advantage. Under these circumstances I do not think either that the defendant Hari Prasad, who never took the plea in the Court of first instance, nor in the lower appellate Court, should at this stage be allowed to raise the plea for the first time, not so much on his own behalf as on behalf on his antagonist, Mata Prasad, plaintiff in the connected suit. I would therefore reject the plea and deal with the suit with reference to the rights of the parties as they already have been arrayed as parties to the suit.

This leads me to the consideration of the *third* and perhaps the most important point in the case, namely, the legal effect of the purchase from Kazim Husain and Nadir Husain made by the defendant Hari Prasad under the sale deed of the 20th September 1886. That such a sale and purchase cannot mean the enforcement of the defendant Hari Prasad's securities is obvious; because, as I explained in the case of *Kishan Lal* v. *Ganga Ram* (2), a simple mortgagee could not without intervention of the Court bring the property to sale by his own private act, and it follows *à fortiori* that he could not by privately purchasing the property himself achieve the same results. His purchase therefore is nothing other than a purchase which, though valid so far as the mortgagor is concerned, can have no effect in defeating the right of the mesne or puisne incumbrancers. The question then is, whether such pur-

(1) I. L. R. 13 All. 315.
(2) I. L. R. 13 All. 28 (v. p. 43).

chase extinguished such rights as he had under his mortgages of the 10th September 1882, and the 23rd February 1884, which were prior to the plaintiff Mata Din Kasodhan's mortgage of the 6th August 1885, which he seeks to enforce in this suit, and if such purchase did not so extinguish those mortgages, to what extent may they be used as a shield or protection for the defendant Hari Prasad in resisting the plaintiff Mata Din Kasodhan's suit?

This question is by no means *res integra*, so far as I am concerned, because it had to be considered by me on a former occasion in *Sirbadh Rai* v. *Raghunath Prasad* (1) and again in *Janki Prasad* v. *Sri Matra Mautangui Debia* (2). In both those cases I had the honor of being associated with Mr. Justice Oldfield, and in both of those cases I had the misfortune of not being able to agree with my hon'ble colleague as to the exact scope and extent of the rule enunciated by the Lords of the Privy Council in (3) *Gokaldoss Gopaldoss* v. *Rambux Seochand*, which is the leading case upon the subject, and the authority of which cannot be questioned by this Court. The former of these cases was the subject of an appeal to the whole Court under s. 10 of the Letters Patent and is reported as *Raghunath Prasad* v. *Jurawan Rai* (4), where, as I understand the Full Bench ruling, my dissentient judgment was upheld and the decree framed was in accordance with what I had suggested in my judgment in the Division Bench. But in consequence of the brevity of the judgments in that case, it has been contended before the Full Bench in this case that the *ratio decidendi* upon which my judgment proceeded in the case of *Sirbadh Rai* v. *Raghunath Prasad* (1) was not approved by the Full Court, and that it is therefore still *res integra* so far as the Full Bench of this Court is concerned. As to this contention, all I need say is that no other *ratio decidendi* is suggested by the Full Bench ruling (I. L. R., 8, All., 105) in the case, and that the judgment of my brother Straight suggests no doubt in my mind that he adopted the *ratio decidendi* and its conclusions which I had expressed in dissenting

(1) I. L. R. 7 All. 568.
(2) I. L. R. 7 All. 577.
(3) L. R. 11 I. A. 126; s.c. I. L. R. 10 Calc 1035.
(4) I. L. R. 8 All. 105.

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from Mr. Justice Oldfield in the case when it was before the Division Bench (I. L. R., 7 , All., p. 568, *vide* pp. 573-76). The contention however raises doubts which, I understand, are shared on the Bench, and I therefore feel called upon to repeat what I said in that case, as part of my *ratio decidendi* in this case.

Referring to the ruling of the Lords of the Privy Council in *Gokaldoss Gopaldoss* v. *Rambux Seochand* (1), and explaining it (*vide* pp. 571—72 of I. L. R. 7 All.), I went on to say :—

"Such being my interpretation of the ruling of the Privy Council in the case of *Gokaldoss Gopaldoss* (1), I cannot help feeling that the present case has a different aspect The appellants, by paying off Lachman's prior mortgage of 1866, are no doubt entitled to claim the benefits of that mortgage, but they cannot, in my opinion, be understood to have acquired rights greater than those which Lachman himself possessed. It seems to me that appellants possess two distinct capacities, *first* as holders of the equity of redemption, and, *secondly*, as persons entitled to the benefits of Lachman's mortgage of 1866. It is clear that in the former capacity they could not resist the suit which aims at enforcing a valid security, and in the latter capacity, the payment of the mortgage of 1866 can at best place them in the position of assignees of that mortgage (*vide* last sentence in Story's "Equity Jurisprudence," s. 1053 c.)

"But such position will not, as I understand the law, enable them to prevent sale of the property in enforcement of the plaintiff's mortgage of 1874, because such sale would not disturb or clash with the rights under the mortgage of 1866 which they have acquired by subrogation, and in their capacity as such, the exercise of the plaintiff's rights cannot affect them. Nor can I hold that the union of the latter capacity with the former can in itself confer upon them rights higher than those which the mortgage they have paid off created. To hold the contrary view seems to me to amount to the proposition that the purchaser of the equity of redemption and the first mortgagee could, by a transaction entered into in *the*

(1) L. R. 11. I. A. 126 ; s c. I. L. R. 10 Calc. 1035.

absence of the intermediate incumbrancer, and irrespective of his interests, place him in a worse position than before. Such a doctrine would be analogous in principle to the rule of tacking which the law of mortgage in this country, so far as I am aware, never recognised, and which has now been expressly negatived by s. 80 of the Transfer of Property Act.

"The matter therefore resolves itself into the question, whether the holders of the rights of mortgage of 1866 could prohibit the enforcement of the mortgage of 1874; in other words, can a prior mortgagee prevent the sale of the equity of redemption in enforcement of a subsequent security?"

"It seems to me that, notwithstanding the mortgage, the mortgagor or the holder of the equity of redemption can alienate his rights by private sales, and it follows that he can do so by hypothecation. Such sale or hypothecation would, of course, be subject to the prior mortgage, and could in no manner disturb the priority of lien possessed by the prior incumbrancer or militate against his interests. So long as there can be no conflict between the rights created by the prior and the puisne incumbrances, it appears to me that property subject to two or more incumbrances can be sold in enforcement of any one of them, and the purchaser in such sale would acquire such right as the position of the incumbrance with reference to the rule of priority could convey. Such seems to me to be the effect of the unreported ruling of this Court (S. A. No. 159 of 1876), to which my brother Oldfield was a party. I think I may safely say that such was the law and the uniform course of decision before the passing of the Transfer of Property Act, and I have not been able to find any provision in that Act which lays down the contrary rule. S. 74 of the Act enunciates the rule that a subsequent mortgagee possesses the right to pay off a prior mortgage, but such provision cannot be understood to confer upon the prior incumbrancer the power of prohibiting either the mortgagor from dealing with the equity of redemption or the puisne incumbrancer from enforcing his security, of course subject to the rights created by the prior incumbrance. Indeed s. 96 of the Act distinctly

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contemplates enforcement of puisne incumbrance without paying off the prior incumbrances, for it speaks of the sale of property subject to prior mortgage. Such a sale in enforcement of a puisne incumbrance cannot affect the prior mortgage, and no such conflict of rights can take place as in the case before the Privy Council, where both the contending mortgages included the right of possession which of course could not be simultaneously enjoyed by both the mortgagees. It seems to me that any other view of the law would necessarily involve the proposition that the only manner in which a puisne incumbrancer by hypothecation can enforce his security, is to pay off the prior mortgage first, and then to bring the property to sale. It is easily conceivable that such a rule would operate as a great hardship in cases where the value of the prior security is enormously larger than the amount of the puisne incumbrance, whilst in cases where the amount due on the prior mortgage does not become payable till long after the due date of the subsequent mortgage, the puisne incumbrancer would be obliged to wait for his money till the prior mortgage became redeemable. I find much difficulty in holding that the law contemplates such contingencies, and I am of opinion that a puisne incumbrancer is not prevented by the mere fact of the existence of a prior mortgage from enforcing his securities, so long as such enforcement does not clash with the rights secured by the prior mortgage.

"Under this view, the appellants, as purchasers of the equity of redemption, hold that right, subject to the plaintiff's mortgage of 1874, and the fact of their having redeemed the mortgage of 1866 does not place *the equity of redemption* on a better footing, though it entitles them to the benefits of that mortgage, secured to them in the same manner as to the original mortgagee Lachhman, whose rights they have acquired by subrogation. In arriving at this view, I have had to consider whether the case of *Gya Prasad* v. *Salik Prasad* (1) is an authority which binds me to adopt a contrary opinion. Having carefully examined the case, I find that

(1) I. L. R. 3 All. 682.

it was not a Full Bench ruling of this Court, but only a reference under s. 575 of the Civil Procedure Code, arising out of a difference of opinion between the learned Judges of the Division Bench (Pearson and Oldfield, JJ.). The case was then heard by Stuart, C. J., and Straight, J., in the absence of the learned Judges who referred the case, a procedure which, according to the view expressed by a Bench of three Judges of the Court in the case of *The Rohilkhand and Kumaon Bank* v. *Row* (1) was erroneous. But putting aside this consideration, I find that out of the four judgments that are reported in that case, the judgments of my brothers Oldfield and Straight bear upon the question, which I am now considering, whilst the judgment of Pearson, J., proceeds upon a totally different ground, and the judgment of Stuart, C. J., is silent upon the point. Under these circumstances I do not feel myself bound by the ruling upon the point immediately before me, namely, whether the purchaser of the equity of redemption, who pays off a prior mortgage, can, by reason of acquiring the benefits of that mortgage, prevent the property from being brought to sale in enforcement of a mortgage which is anterior to the purchase, but subsequent to the mortgage paid off. Before leaving this question, however, I must refer again to some of the cases which I have already cited. The report of the case of *Ramu Naikan* (2) is not very clear upon this point, but I may take it, that it laid down the rule "that a subsequent mortgagee gets all to which he is entitled when he is allowed to redeem the first mortgage." This is the *dictum* of Dernburg cited and adopted by Mr. Justice Holloway in that case; and the effect of the last part of Mr. Justice West's judgment in the case of *Mul Chand Kuber* (3) seems to be the same. With nearly the whole of that judgment I fully concur, and I would not willingly dissent from the conclusion of such eminent judges even upon the point now under consideration, were it possible for me to hold that the right of a prior incumbrancer enables him to suspend the enforcement of the puisne incumbrance by hypothecation, and that redemption of the former is a condition precedent to the

(1) I. L. R. 6 All 468. (2) 7 Mad H. C. Rep 229.
(3) 11 Bom H. C. Rep 41.

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enforcement of the latter, and so long as I cannot hold this I find myself unable to hold that the doctrine of subrogation can enable the party who benefits by it to hold rights which the prior incumbrancer (to whom he is subrogated) himself never held. I have carefully studied, and, I may say with great advantage, the judgments of Mr. Justice Holloway and Mr. Justice West, both of whom I esteem as eminent Judges, and great jurists, but (I say this with profound respect) neither of those judgments contains any exposition of the law upon the exact point on which I have ventured to differ from them, and no other authorities have been cited which sufficiently satisfy me to arrive at any conclusion other than that at which I have arrived. In all the cases to which I have been referred, the exact point seems to have been assumed or taken for granted as a necessary corollary to the doctrine of subrogation which prevents extinguishment of the prior mortgage."

When I expressed these views I must have been unaware that the same principle had already been adopted by the Madras High Court, for, in the report of my judgment I find no reference to those cases. One of them is the case of *Vencatachella Kandian* v. *Panjanadien* (1) which was decided by Turner, C. J., and Kindersley, J., and from the judgment of Sir Charles Turner in that case I wish to quote a passage which expresses my views in language better than I can employ. After dealing with the ruling in *Ramu-Naikan* v. *Subbiaya Mudali* (2) Sir Charles Turner went on to say :—

"If a person holds a mortgage on an estate, and after the owner has created a second mortgage in favour of a third party, acquires what right remains in the owner he does not thereby lose his right as mortgagee. The merger is prevented by the interposition of the right created in favour of the second mortgage, but I cannot accept the application of the principle adopted by the Court. When a second mortgage is created in favour of a person who is not the holder of the first mortgage, the second mortgagee is entitled to pay off the first mortgage, or to sell the estate subject to the first charge. On the same ground of regard for the interests of all parties that

(1) I. L. R. 4 Mad 213. (2) I. L. R. 8 Mad. 246.

dictates the preservation of the rights created by the first charge, I am unable to see why the acquisition by the first mortgagee of the right remaining in the owner deprives the second mortgagee of his right to enforce his charge by a sale of the property subject to the rights of the mortgagee. If the first mortgagee had not acquired the right remaining in the owner, it is unquestionable that the second mortgagee would have been entitled to call for a sale of the property subject to the rights of the prior incumbrancer. His right should not be defeated by a transaction to which he is no party. If it had been considered an objection to the preservation of his right that the first mortgagee might subsequently have applied to the Court to order a sale (and I do not think it is, for the purchaser under the second mortgage might redeem the first mortgage and prevent a sale) then a sale should have been ordered of the property to discharge both mortgages and the proceeds should have been applied to their satisfaction in order of priority, but I believe the course which would have best fulfilled the contracts and secured the rights of the parties would have been to allow a sale subject to the first incumbrance."

I entirely agree with these views, and it was in accordance with the principles therein enunciated that in a later case *Ganga Dhara* v. *Sivarama* (1) the decree with the concurrence of Turner, C. J., and Muttusami Ayyar, J., was prepared—thus indicating that three Judges of the Madras High Court, namely, Turner, C. J., Kindersley and Muttusami Ayyar, JJ., agreed in a view similar to that which I took in a case of *Sirbadh Rai* v. *Raghunath Prasad* (2) and which, as I understand, was approved by a Full Bench of five Judges of this Court on appeal in *Raghunath Prasad* v. *Jurawan Rai* (3), when I had not the honor of being a member of that Bench. To the names of the learned Judges of the Madras High Court which I have mentioned I may add the name of Mr. Justice Shephard, who, in his commentary on s. 101 of the Transfer of Property Act, which only enunciates the old rule of Equity as explained by the Lords of the Privy Council in the case of *Gokuldoss Gopaldoss* v. *Rambux*

(1) I. L. R. 8 Mad. 246. (2) I. L. R. 7 All. 568.
(3) I. L. R. 8 All. 105.

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Seochand (1) and referring to my dissentient judgment as to the effect of that ruling in *Sirbadh Rai* v. *Raghunath Prasad* (2) goes on to express views which I wish to quote *verbatim* simply to show how fully that learned Judge agrees with me in interpreting the efficacy of the doctrine of merger and subrogation within the meaning of the Privy Council ruling. Mr. Justice Shephard says in the second edition of his work on the "Transfer of Property Act" (pp. 372-373) :—

"Mahmood J. held that under the rule in Gokal Doss' case the defendant could not be understood to have acquired rights greater than those of the first mortgagee and that, as the latter could not have resisted a suit for sale at the instance of the second mortgagee, so the defendant, though entitled to possession until redeemed, could not prevent the plaintiff enforcing the security so long as such enforcement did not clash with the right secured by the prior mortgage. This decision, which agrees with that of the Madras High Court, seems unquestionably right."

I think I may add that the same is the effect of the rule as stated by Dr. Rashbehari Ghose, in the second edition of his well known work on the Law of Mortgage in India (pp. 141-2), and I now proceed to explain that if the rule is carried further, it would involve the recognition of the principle of tacking which has been expressly abolished by s. 80 of the Transfer of Property Act. Perhaps the best way to express my meaning is to take an illustration :—

A mortgages first to B for Rs. 5,000 and then to C for Rs. 3,000. Subsequently B purchases the rights of ownership still remaining in A from him for Rs. 15,000.

C. comes into Court to enforce his security by sale of the mortgaged property impleading the mortgagor A and the mortgagee B. The suit would thus be properly arrayed in point of parties according to section 85 of the Transfer of Property Act, for the illustration assumes that no other person is interested in the property.

(1) L. R 11 I, A 126; s. c. I. L. R. 10 Calc. 1025.
(2) I. L. R. 7 All. 568.

A does not appear to defend the suit, or if he appears admits C's claim.

B pleads that the purchase made by him was partly in lieu of money due upon his prior mortgage, the amount then due upon the mortgage being Rs. 11,000 and partly for a further sum of Rs. 4,000 which he paid to A as part of the consideration of sale and that therefore the plaintiff C could not bring the property to sale.

The question then would be what is the exact effect and scope of such a plea? It is clear according to the Privy Council ruling in *Gokuldoss Gopaldoss* v. *Rambux Seochand* (1), as explained by me in *Sirbadh Rai* v. *Raghunath Prasad* (2), that the fact of the purchase by B of the rights of A did not extinguish B's prior mortgage so as to render it unavailable to him as a shield or protection in resisting the claim of the puisne mortgagee C, and the same is the effect of s. 101 of the Transfer of Property Act.

But, then, the question would be, what is the exact extent of the shield or protection to which the defendant B, in his double capacity of being the prior mortgagee and the purchaser of A's right would be entitled to as against the plaintiff C? My answer to the question is that such shield or protection must be regarded as co-extensive with the pecuniary and other liabilities enforcible under B's prior mortgage, neither more nor less. So that in the illustration the pecuniary value of the shield or protection to which B would be entitled would be exactly Rs. 11,000, which, according to the illustration, was due to B upon his prior mortgage at the time of his purchase from A. And here I may say at once that to that extent B would be entitled to assert his priority and insist that no sale that would take place in enforcement of C's security, should be free of the incumbrance to that extent by reason of priority. But he would be entitled to no such priority with reference to the Rs. 4,000 which he advanced subsequently to the mortgage in favour of C in making his purchase from A. To hold that by pure dint of being a prior mortgagee making a purchase behind the back of the puisne mort-

(1) L. R. 11. I. A, 126. s, c. I. L. R. 10 Calc. 1035.
(2) I. L, R, 7 All. 568.

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gagee C, he (*i. e.* B) obtains priority also in respect of the fresh Rs. 4,000 would be to hold that he could tack on this fresh advance to his prior mortgage and thus postpone C's security. I say so, because the rule in principle would be the same, if instead of making the purchase from A, B had obtained another mortgage in lieu of the fresh advance of 4,000 rupees.

In my opinion, our law does not allow this, for it repudiates the doctrine of tacking, and I hold that in the case supposed in the illustration, all that B would be entitled to is to assert his priority of incumbrance to the extent of 11,000 rupees due upon his prior mortgage at the time of the purchase from A, and that as to the further advance of 4,000 rupees, he should be regarded as puisne to the plaintiff C. In other words, as prior mortgagee, he could claim priority to the extent of the moneys due upon the prior mortgage, but as purchaser of the rights of the mortgagor A, he could not resist the suit of the plaintiff C, the object of whose suit is only to sell such rights as existed in it at the time of the mortgage and subsisted in him, till he, dealing direct with the prior mortgagee B, conveyed them to him by private sale. Those rights cannot be protected simply in consequence of the accident of the purchaser happening to be a prior mortgagee, and it is only in respect of the saleability of rights that any difference of opinion existed between the views of Mr. Justice Oldfield and my own in the case of *Sirbadh Rai* v. *Raghunath Prasad* (1).

Applying these principles to the present case, all that the defendant Hari Prasad could plead was that his prior mortgages of the 10th September 1882, and the 23rd February 1884, were not extinguished by his purchase of the 20th September 1886; that the priority arising from those mortgages was still available to him as a plea requiring that the enforcement of Mata Din Kasodhan's security of the 6th August 1885, by enforcement of sale cannot be decreed free of the prior two mortgages; and that it should be so declared in passing the decree in favour of the plaintiff Mata Din Kasodhan. Beyond this I am unable to hold that he (Hari Prasad,

(1) I. L. R. 7 All. 568.

defendant) either as prior mortgagee or as the purchaser of the rights of Kazim Husain in the 4 annas share of mauza Barwa Kotwa (which is the only subject matter of this appeal) had any right to resist the suit, unless indeed he contested the genuineness and validity of the plaintiff's mortgage of the 6th August 1885, which he did not do. Nor, as I have already explained, did he object to the frame of the suit in point of parties by reason of Mata Prasad, the puisne mortgagee of the 21st August 1885, not being impleaded as a party defendant to the suit.

In accordance with the views expressed in this judgment, I would decree this appeal, and, setting aside the decree of the Lower Appellate Court, remand the case under s. 562 of the Code of Civil Procedure to that Court, directing it—

(1) To take an account of what was due to the defendant Hari Prasad on his mortgages of the 10th September 1882, and the 23rd February 1884, in respect of the 4 annas share of Kazim Husain in mauza Barwa Kotwa (which is now in suit) at the time when the sale-deed of the 20th September 1886, was obtained by the defendant Hari Prasad.

(2) To pass a decree in favour of the plaintiff in accordance with the terms of section 88 of the Transfer of Property Act, allowing the defendants such period as the Court may think fit for payment of such sum of money as may thus be found due upon the plaintiff's hypothecation bond of the 6th August 1885.

(3) To decree that in default of such payment the property, subject to the plaintiff's mortgage of the 6th August 1885, be sold subject to the prior lien of Hari Prasad under his mortgages of the 10th September 1882, and the 23rd February 1884, so far as they affect the 4 annas share of Kazim Husain in mauza Barwa Kotwa, the amount found due to the defendant Hari Prasad in respect of Kazim Husain's 4 annas share in suit under the defendant Hari Prasad's mortgages of the 10th September 1882, and the 23rd February 1884, as ascertained under the first issue, thus remitted.

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I would leave the question of costs to the discretion of the Lower Appellate Court under s. 220 of the Code of Civil Procedure.

For similar reasons I would decree the appeal of Mata Prasad (S. A. No. 1213 of 1888), and would frame a decree on similar principles, but since I understand that the views adopted by the majority of the Full Bench are opposed to mine, I need not pass a decree which is opposed to their views.

STRAIGHT, J.—I have had the great advantage before coming into Court of carefully perusing and considering the judgments of the learned Chief Justice and my brother Mahmood, and it is not without having given the fullest attention to all the arguments used in those two learned and exhaustive judgments that I have come to the conclusion that the view which the learned Chief Justice has taken is the correct one and that in which I ought to concur. I have only a few words to add. In one portion of my brother Mahmood's judgment there is an elaborate reference to the difficulties likely to arise where the frame of a mortgage suit is such as the learned Chief Justice holds it should be, in the application of the principle of *res judicata* between the parties arrayed as defendants. Now, if I understand the law aright, when a statute specifically declares that a particular form of suit is to have the parties who fill certain characters in reference to the property to which the suit relates, arrayed therein, the Court having to deal with that suit must not only deal with the rights of the plaintiff and defendants on the one side and on the other, but must deal with and adjust the rights of the defendants *inter se*, just as much as in a partition suit where one of the several joint owners is seeking partition as against half a dozen others, not only has the measure of the plaintiff's right and share to be determined, but also the measure of that of each of the defendants. I believe that no doubt exists in the mind of any lawyer that in a partition suit it is incumbent on a plaintiff to bring in as parties all those who are interested in the subject matter. And why? Necessarily for the purpose of effectually once and for all ascertaining and settling their respective rights and providing against the possibility of further litigation. My brother Mahmood has more than once spoken of the

statute of limitation as a statute of repose. From what I remember when I first arrived in this country as to the multiplication of suits that used to come before this and the other Courts with reference to mortgaged property, the inconvenience which continually arose and the mischiefs that attended them, I am not at all surprised that the Legislature put its foot down very firmly, and determined by the framing of s. 85 of the Transfer of Property Act to strike a death blow to that multiplication of suits which becoming a perfect pest to the Courts which had to administer the law; and s. 99 is also illustrative of the drastic methods the Legislature adopted, and, in my opinion, properly adopted. In the old days it was often the practice for a mortgagee to put his mortgage debt in suit as a simple money claim and not to ask for sale of the mortgaged property. It was also the practice for a mortgagee having an independent money claim against the mortgagor to bring a suit, obtain a decree and attach the mortgaged property and subsequently to bring it to sale. I need scarcely point out the complications and difficulties which often arose when there were subsequent incumbrances and as to what was the precise nature of the interest the mortgagee, if he purchased himself, as he invariably did, had acquired, and if he did not purchase himself but some third party did purchase that person almost always bought the luxury of a law suit, while, in either event, the mortgagor suffered. It was to meet this that s. 99 was enacted, which provided that where a person standing in the position of a mortgagee of landed estate obtains a decree against his mortgagor for the satisfaction of any claim, "whether arising under the mortgage or not," and not being a decree for sale on his mortgage, and attaches the mortgaged property he shall not bring the property to sale until he has first brought the suit provided for by s. 67 in which the parties must be arrayed as provided in s. 85 and he may do so without any bar of s. 43 of the Code of Civil Procedure. Now I say these two provisions are a strong indication that the Legislature intended, and most righteously intended, to have litigation with regard to mortgaged estate so far as possible dealt with and disposed of in a single suit with all the parties interested in the mortgaged property before the Court. I

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just may in conclusion refer to the decree my brother Mahmood would pass in the present suit, namely, that an account should be taken declaring what was due on a particular date to the defendants Hari Prasad, and, necessarily also that an account should be taken as to what was due to the mortgagee, plaintiff, and that the puisne incumbrancer, should have a right to sell the property subject to the ascertained amount due to Hari Prasad. Now if Hari Prasad had come into Court to enforce his mortgage, making the present plaintiff a party defendant, as he would be bound to, it cannot be denied that the only right the latter would have to stand in the way of the sale prayed for would be a right to redeem. I cannot myself see why because the plaintiff Mata Din was the first to come into court his position is any better or stronger. No doubt the amount of Hari Prasad's prior incumbrance has been determined between Mata Din and Hari Prasad, but what about the absent mortgagor who has never appeared in the suit, or Mata Prasad who has never been brought on as a party, what is to prevent the mortgagor from hereafter, as against Hari Prasad, denying the mortgage to Mata Din and Mata Prasad; or Mata Din and Mata Prasad contesting with one another the genuineness or otherwise of their several mortgages. In any event Hari Prasad is left to the almost certain prospect of further litigation when he desires to enforce his prior mortgage. Now in the particular form of suit which is contemplated by section 85 what hardship is there in the form of decree that would have to be passed? It would do no more than give effect after investigation and determination to the actual rights of the respective mortgagees which by the Transfer of Property Act are declared. In neither of the present cases did Mata Din or Mata Prasad include the other as a defendant, although they had full knowledge of each other's charge and they each sought to bring to sale the whole eight annas of Barwa Kotwa. In my opinion the learned Chief Justice's decree is the right one, the provisions of section 85 being in my opinion mandatory and imperative and the interests of each of these persons being known to the other in each case and they not having been joined as parties defendant, the

several suits were bad and were rightly dismissed by the Lower Appellate Court.

TYRRELL J.—I concur in the judgment and decree of the learned Chief Justice.

KNOX, J.—This second appeal raises questions of great importance with respect to the rights of second and other subsequent mortgagees. I do not propose to recapitulate the facts of the case. They have been given so fully by the learned Chief Justice and by my brother Mahmood, that I shall content myself with formulating the results found into two or three brief sentences. Mata Din, with whose rights this appeal is concerned, occupies the position of a third mortgagee in point of time, and he prays the Court for an order that a deed of sale over the mortgage, property, subsequent in point of time to his mortgage, and obtained by the mortgagees prior to him in lieu of monies due to them under two simple mortgage-deeds held by them may be set aside, and the mortgaged property, the subject of his, Mata Din's, mortgage-deed, brought to sale. He has made no tender of the amount due to the said prior mortgagee, and, moreover, has not sought foreclosure of a simple mortgage executed by his mortgagor in favor of a mortgagee subsequent to him, *viz.*, one Mata Prasad. Moreover, he has made Mata Prasad no party to this suit.

The question is whether, under the above circumstances, this Court should grant him the relief he prays for, and whether he, under the said circumstances, is entitled to an order for sale of the mortgaged property.

There can be, and there is, no question raised but that the law controlling the present case is that contained in Act IV of 1882.

The several mortgage-deeds which have been filed in this record, read in the light of the said Act, are amply sufficient to determine the position which the parties occupy to one another.

Two persons, Kazim Husain and Nadir Husain, mortgagors, have purported to create by transfer at different times rights in or over this same immovable property. The mortgaged property which Mata

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Din Kasodhan seeks to bring to sale is, so far as is material for the purposes of the present appeal, a 4 annas share out of 8 annas of Barwa Kotwa. The transferor, Kazim Husain, in Matadin's favor, gave or purported to give Matadin on the 6th of August 1885, the right to bring this property to sale if he did not repay on or before a date specified the monies borrowed by him. But the same Kazim Husain had on a prior date joined in creating an exactly similar right over the same property in favor of one Hari Parsad, and on a second date still prior to the 6th of August 1885 had a second time purported to give the said Hari Parsad a similar right over the same property.

In each case he purported to give Hari Parsad the same right which he purported to create in favor of Matadin, *viz.*, the right to sell the 4 annas share in mauza Barwa Kotwa. So far as this property is concerned, he imposed no limit, and when the parties contracted on the first and on the second occasion, Hari Parsad may have been and probably was the more ready to grant the loan asked for, by the knowledge that he by the transaction acquired a right to ask the Court in the case of default by the mortgagor to bring to sale the whole of the property until his debt was satisfied. He might well have refused to enter into the transaction if he had known or contemplated that the whole or some portion of this property would be brought to sale without his having a hearing and without, at any rate, his debt being repaid before that sale was ordered. Property does not, as a rule, improve in value by being made the subject of repeated transactions of sale, and it is not difficult to contemplate the case of property originally sufficient in value to satisfy three or more mortgages for which it is made security depreciating owing to sale, it may be one sale only, to such an extent that it no longer commands in the eyes of the buying public a value sufficient to cover two of the three or more mortgages for which it was accepted and would have sufficed as security but for its having been put up to sale.

The rights to sell created by these mortgages were not rights which could be exercised to their full extent together, and there

being in the prior mortgages no special contract or reservation binding the earlier transferee, the right created in favor of Matadin was subject to the rights previously created and was neither more nor less than the right of a subsequent mortgagee.

The rights of subsequent mortgagees as against a prior mortgagee, so far as regards redemption, foreclosure and sale of the mortgaged property are defined and limited by section 75 of the Act. They are simply the rights which the mortgagor has against the prior mortgagee and no other right of any kind whatever. We are not left without guidance in the Act as to what those rights are. They are enumerated in the sections numbered as ss. 60 to 66, both inclusive, and throughout those sections the word "sale" or the verb "to sell" in any form occurs only once, *viz.*, in s. 63, where it obviously has no reference to the question immediately before me. I fail to find any express right of sale conferred upon the mortgagor as against his mortgagee throughout those sections.

Similarly, when I come to contemplate what rights Matadin Kasodhan has so far as regards sale of the mortgaged property as against a subsequent mortgagee, I find, on again returning to s. 75, that he is confined to the rights which he has against his mortgagor. These are set out in s. 67 to 77 of the Act, and they are confined (the exceptional circumstances of s. 69 which do not apply here being always excepted) to an order from a Court for sale obtained in a suit to which such mortgagor, or, in the case immediately under contemplation, subsequent mortgagees—the words must be interchanged—is a party.

Thus, then, I hold that, as regards mortgagees prior to him, if a mesne incumbrancer wishes to bring mortgaged property to sale, and joins in the suit against the mortgagor, as he should do and has done in the present instance, a prior mortgagee, he can do so only by redeeming or asking for redemption. Moreover, he cannot, so long as he, the mesne incumbrancer, occupies the position of a second or subsequent mortgagee, bring the property to sale, if he can bring it to sale at all, except by a suit to which every mortgagee is a subse-

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quent party. He has, in short, not the free hands that a prior mortgagee has. Nor is there any hardship that I can see in his being fettered and restricted in his right regarding the mortgaged property by the existence of the prior and subsequent mortgages. He took his mortgage with notice of the existence of the mortgage prior to his and presumedly with a knowledge that his right would always be subject to it. Further, the fact of the mortgagor resorting to him and contracting with him a subsequent mortgage should have rendered him alive to the possibility of the mortgagor creating further and subsequent mortgages, if he can obtain them.

I have not attempted to govern my judgment by precedent, for the simple reason that this point has been so thoroughly exhausted by the learned Chief Justice. He has reviewed the authorities to be found in the judgments of this Court, of the other High Courts, and of their Lordships of the Privy Council.

That review shows that in almost every case, and that virtually, with the exception of two learned Judges, all other Judges who have considered a similar question to the one now before this Court have held directly or impliedly that "a mortgagee had no right to bring mortgaged property to sale under his mortgage without redeeming the prior mortgagee, if any, or affording the subsequent mortgagee, if any, an opportunity to redeem, and that in a suit by a mortgagee for sale on his mortgage, the other mortgagees, whether prior or subsequent, were necessary parties; and further, that the property which might effectively be brought to sale under a decree for sale in a mortgage suit was the specific immovable property, and not merely the rights and interests of the plaintiff and his mortgagor in such property." I need hardly say that I have for myself carefully examined these authorities, and I agree with him in the results which he has deduced from them and which I have just given expression to. It is therefore needless for me to say more upon this part of the appeal than that with such authorities before me, it is impossible to arrive at a conclusion which would have the practical effect of declaring those authorities to be in error, unless I were able to prove conclu-

sively from sources not considered in those judgments that there was room for another and a different opinion.

Such sources I have not been able to discover, nor have I been referred to them. On the contrary, the law appears to me to confirm, and to have been framed, whether of set purpose or not, in accord with those of the authorities cited above which were prior to 1882.

It will be seen from the view that I have taken that, independently of the presence of section 85 in the Transfer of Property Act, Matadin Kasodhan could not have succeeded in the present suit without joining as a party to it Mata Prasad. Whether he could have succeeded had he arrayed Mata Prasad as a defendant, it is needless to consider, for he has not so arrayed him.

Section 85 of the Act is, in my opinion, only the conclusion of the whole matter discussed in the previous section. It shows that an insuperable bar is placed in the way of all plaintiffs who bring a suit under Chapter IV of the Transfer of Property Act, unless and until they array as parties to the suit all persons having an interest in the property comprised in the mortgage sued upon, always provided that the plaintiff had notice of such interest when he brought the suit, or at any time when he could have asked the Court to make an interested person a party.

It is not open to the appellant to plead that he had not such notice.

I am of opinion that any mortgagee who brings a suit under the Act touching the mortgaged property, does so at the risk of having his suit rejected if he neglects to search the registers kept by the registrar of the district in which the mortgaged property is situated and to array as parties to his suit all whom from those registers he finds to be persons having an interest in the mortgaged property. This precaution is neither impossible nor impracticable and is only what every prudent man will adopt upon seeing the stringent language contained in s. 85 and the definition of the term "notice" in s. 3. In this case, however, there was another course open to Matadin. At the same time that he brought his suit, a suit of a

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similar nature had been filed by Mata Prasad, the subsequent mortgagee, and was being prosecuted *pari passu* with his suit. How can it be said, then, that he had no notice of the subsequent mortgage, and that it was not open to him to ask the Court under s. 32 of the Code of Civil Procedure to array as a party to his suit Mata Prasad?

It is urged that s. 85 must be read as controlled by s. 34 of the Code of Civil Procedure, and that this Court must consider the want of parties as a matter which has been waived.

If the view which I hold regarding the rights of a subsequent mortgagee be correct, it is obvious that s. 34 of the Code cannot control s. 85 of the Transfer of Property Act, but must give way to it.

Further, waiver can only be made of advantages which the law confers solely for the benefit and protection of an individual in his private capacity, and where such law can be dispensed with without infringing on any public right or public policy. There can, however, be little or no room for doubt that s. 85 found its place upon the statute book, not merely for the protection of individual persons, but to put an end to scandals which prevailed and which were so graphically described by the Hon'ble Mr. Evans when the Transfer of Property Act was being brought on to the statute book. He particularly notes that there then existed "no machinery for bringing together into one suit the various incumbrances on the property; endless confusion had been the result, and the decisions of the courts upon the almost insoluble problems arising from this state of things had been numerous and contradictory. The result was that the mortgaged property could not fetch anything like its value. The debtor was ruined, the honest and respectable money-lender discouraged, and a vast amount of gambling and speculative litigation fostered:" and concluded with the pregnant words,—"It had been one of the objects of this chapter to remedy these and other similar evils."

It is also contended that a result of s. 85 will be to convert a suit under the mortgage chapter into a suit for the settlement of all dis-

putes that may arise between the parties interested in the mortgaged property; that it is easy to contemplate such a suit being of a most complex nature and one for the determination of which in one and the same suit the Civil Procedure Code makes no suitable provision. It may be well doubted whether this be so, but even were this a good objection, my answer to it is that I have to administer the law as I find it, and not as I might prefer it to be.

I find that a similar rule prevails in England. The rule there as enunciated by Fisher in his well-known Treatise on Mortgage is,—"As a general rule, all persons who have an interest either in the right of redemption, or in the security, must be joined, though the result may be the trial of a legal right between parties thus brought before the Court for different purpose" (Fisher on Mortgage, ss. 13-60). And I observe on the same authority a case quoted whereon a bill to redeem it became necessary to decide as to the voluntary character of a post-nuptial settlement (1 Eden. 55).

It would be difficult to contemplate a case involving more complex interests.

It must not be overlooked that the language contained in s. 85 of the Transfer of Property Act varies in a remarkable degree from the language usually employed in statutes. For reasons best known to those who drafted the section, and reasons which I think they have given expression to, the framers of the Act have not contented themselves with saying that all persons having an interest in the property may or shall be joined as parties to any suit under Chapter IV of the Act. They have gone further and prescribed in language which may be inartistic, but is most expressive, that all such persons must be joined as parties. I am well aware of the conflict of opinion which has obtained over the interpretation to be placed on the word "may" and the words "it shall be lawful" in interpreting procedure authorized by a statute, a conflict which was fully considered in the case *Julius* v. *Lord Bishop of Oxford* (1). Whether in this case I follow the rule of interpretation that the meaning of words regulating procedure are to the "solved *aliunde* from the context, from the particular provisions or from the

(1) L. R. 5 App Cas. 214.

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general scope and objects" of the enactment under consideration, or the rule that "enabling words are always compulsory where they are words to effectuate a legal right," I see no reason for believing that the Legislature intended to leave with the parties interested in a mortgage any option as to what parties they might or might not array or with the courts who have to decide a suit brought under Chapter IV of the Act any option as to whether they might or might not grant relief in a suit where the parties were not arrayed as required by that section. For, in considering this section, we are confronted with a word which is not merely in effect "must" but with the word "must" itself. The procedure so imperatively enjoined is possible, nay, more, it is practicable. There is no place for the argument that the section is merely one which confers a discretionary power. The parties, if they seek relief, are bound to array all persons interested, and the courts before they grant relief are bound to see that the parties do so array the persons interested.

On every ground, therefore, I have no hesitation in concurring with the learned Chief Justice that this appeal must be dismissed.

Last of all, I would only add that I concur in the opinion that "the rights, liabilities and reliefs of mortgagors and mortgagees, including second and subsequent mortgagees, so far as redemption, foreclosure and sale are concerned, were in British India before Act IV of 1882 came into force, what Chapter IV of that Act has defined and declared such rights, liabilities and reliefs to be."

ORDER OF THE COURT.

The Appeal will stand dismissed with costs and the decree below will be affirmed.

Appeal dismissed.

REVISIONAL CIVIL.

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March 18.

Before Mr. Justice Mahmood.

MALIK RAHMAT (PLAINTIFF) *v.* SHIVA PRASAD AND OTHERS (DEFENDANTS).*

Small Cause Court—Judgment of Small Cause Court, what should be contained therein—Revision—Civil Procedure Code, ss. 203, 562, 622, 647—*Act IX of* 1887 *(Small Cause Courts Act), s.* 25.

Section 203 of the Code of Civil Procedure does not relieve the Judge of a Small Cause Court from the necessity of giving some indication in his judgment that he has understood the facts of the case in which such judgment is given.

Where a judgment in a Small Cause Court suit stated merely that the suit was dismissed for reasons given in the Judge's decision in another suit, and the judgment in the suit so referred to was in the following words:—"Claim for recovery of money lent with interest. Reply. Defendant pleads that he has paid the debt to plaintiff. Issue. Has the defendant paid the debt claimed to the plaintiff? Finding. It is not proved that the defendant paid the debt to the plaintiff. Ordered that the claim is decreed with costs:—" *held* that this was in fact no judgment at all, and the case must be remanded for re-trial on the merits under the analogy of s. 562 of the Code of Criminal Procedure, read with s. 647 *ib.*

The facts of this case sufficiently appear from the judgment of Mahmood, J.

Munshi *Jwala Prasad*, for the applicant.

Munshi *Madho Prasad*, for the opposite parties.

MAHMOOD, J.—This is an application under s. 25 of the Provincial Small Cause Courts Act (IX of 1887), and also under s. 622 of the Code of Civil Procedure (Act XIV of 1882), invoking my interference as a Judge sitting in the revisional jurisdiction of this Court in regard to such matters. Mr. *Jwala Prasad*, who appears for the petitioner, and Mr. *Madho Prasad*, who holds the brief of Mr. *Kashi Prasad*, for the opposite parties, are agreed that these two sections apply and that the determination of the case depends upon their effect.

The facts of the case are that one Malik Rahmat, who is the petitioner before me, pawned certain jewels for the amount of Rs. 100

* Miscellaneous application No. 52 of 1890, for revision of a judgment, dated the 19th April 1890, of Babu Mrittonjoy Mukerji, Judge of the Court of Small Causes of Benares.

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to Shco Prasad, Sheopal and Sukhnandan on the 20th August 1887, and it was agreed that whatever sum of money may be repaid out of the debt the pawned property should, to the extent of such payment, be released from the pawn.

Now the plaintiff states that Rs. 40 out of the amount thus due under the pawn of the 20th August 1887, was paid by him, and that to the extent of the value of such payment some of the pawned jewels were released some time about the 27th April 1888, and thereafter another payment of Rs. 67-8 was made some time about the 22nd April 1889, and that upon such payment having been made the defendants had promised to return the rest of the pawned jewels, but that they did not keep their word and the jewels were not therefore returned.

This incident is stated to be the cause of action for the present suit. The suit was met by the plea that the aforesaid sum of Rs. 67-8 was never given to the defendants, pawnees, and that therefore the suit could not prevail.

During the pendency of the cause there was some other dispute between the same parties which was pending in the Small Cause Court, in which the defendant to this cause was the plaintiff and the plaintiffs in this cause were the defendants. The suit was tried by the Small Cause Court Judge of Benares, and that suit was decided on the 19th April 1890, being suit No. 1228 of 1889, and a copy of the judgment in that cause is upon the record.

This being so, the entire judgment in this case passed by the learned Small Cause Court Judge consists of the following words:—

"For the reasons given in my decision in 1228, decided to-day, the plaintiff is not entitled to recover the jewels without paying the debt due to the defendant. Order. Suit dismissed with costs."

Now it was because of the brief manner in which this judgment was worded that I was anxious to see the record of the case to which it referred. The record was sent for by my order of the 20th February 1891, in order to enable me to understand what

reasons were given in the case to which reference was thus made by the learned Judge of the Small Cause Court.

The record has come up and I wish to quote the whole of the judgment in order to show how little there is anything of the expected reasons in the case. The judgment runs as follows :—

"Claim for recovery of money lent with interest. Reply. Defendant pleads that he has paid the debt to the plaintiff. Issue. Has the defendant paid the debt claimed to the plaintiff? Finding. It is not proved that the defendant paid the debt to the plaintiff. Ordered. That the claim is decreed with costs."

This was the order made by Mr. Mrittonjoy Mukerji, exercising the powers of a Small Cause Court Judge, under the jurisdiction which he possessed under the Provincial Small Cause Courts Act (IX of 1887), and this is the kind of judgment in which he, in the exercise of the powers thus conferred upon him, thought fit to exercise them.

It has been to me a matter frequently for consideration on the Bench in this Court whether the Small Cause Court powers, as implied and required by the Small Cause Courts Act (IX of 1887), are such as should be entrusted to officers who are not fully cognizant of the dignity which the finality of a Small Cause Court decree implies.

In the present case I have no doubt that Mr. *Jwala Prasad*, for the petitioner, is perfectly right in contending that there is absolutely no guarantee upon the record itself that the learned Judge, Mr. Mrittonjoy Mukerji, who presided in the Small Cause Court at Benares, ever understood the case at all or the facts which would have a bearing upon the right decision of the case. And I think the learned pleader was perfectly within his rights when he asked me, under the peculiar circumstances of the case, to rule that the judgment, or rather, the so-called judgment, in this case is no judgment at all, because it indicates neither the appreciation of the facts of the case nor of the law which is applicable to them.

Mr. *Madho Prasad*, who holds the brief of Mr. *Kashi Prasad*, for the opposite party, has called my attention to s. 203 of the Code

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of Civil Procedure in order to sustain the only point which he could urge on behalf of his clients, namely, that the Judge of a Small Cause Court is not bound to record judgments in the same fashion and with the same fullness as Judges in other Civil Courts. I wish to say again that Mr. *Madho Prasad* was perfectly right in thinking that the first part of the section is the only one which could help the case of his clients, because upon the facts the learned pleader himself felt that he could not sustain the judgment of the lower Court.

I wish to say now what I have never said before, that the investiture of the Small Cause Court powers in Judges, which does occur and is frequently exercised in the direction of the policy upon which the Provincial Small Cause Courts Act (IX of 1887) is based, and the policy upon which the enactment antecedent to it, Act XI of 1865 was based, may be an exercise of power resulting in disastrous results, keeping in view the finality of the jurisdiction which such Courts possess. In the present case I am afraid such has been the result, because, even keeping in view the provisions of s. 203 of the Code of Civil Procedure, and even keeping in view all that Mr. *Madho Prasad* in his argument has addressed to me in regard to the matter, I have no doubt that the learned Judge of the lower Court should have dealt with the case in the manner required by law, and not in a manner which gives neither the points nor, to me, any guarantee that he sufficiently understood the cause.

The exact extent of the revisional powers contained in s. 25 of the Provincial Small Cause Courts Act, (IX of 1887), has been the subject of consideration in a recent case decided by the Full Bench of this Court in *Muhammad Bakar* v. *Bahal Singh* (1).

Similarly the powers of this Court under s. 622 of the Code of Civil Procedure have been the subject of consideration by their Lordships of the Privy Council in the case of *Muhammad Yusuf Khán* v. *Abdul Rahman Khán* (2).

The effect of these rulings has been considered by me in some earlier cases, to which I need not refer in detail. What I hold now

(1) I. L. R., 13, All., 277. (2) I. L. R., 16, Calc., 749.

is, that under the circumstances of this particular case the learned Judge of the Small Cause Court was entirely wrong in thinking that his judgment in the case to which he refers, namely, No. 1228, contained any reasons for the decision of this cause. I have therefore a case which has been decided without any reasons, and s. 203 of the Code of Civil Procedure will not enable even a Small Cause Court Judge to dispose of cases in this manner, or to think that he has done justice to the parties when he has written a judgment such as the one which is now before me.

I therefore regret that, acting under the powers which this Court possesses as a Court of revision, the only order which I feel called upon to make is that the application be allowed, the judgment of Mr. Mrittonjoy Mukerji, Judge of the Small Cause Court of Benares, dated the 19th April 1890, be set aside as no judgment at all, and that that Court be called upon to pass the proper order in the case according to the requirements of the law. Acting under the analogy of s. 562 read with s. 647 of the Code of Civil Procedure, I set aside the decree and remand the case for trial upon the merits with reference to the order which I have made. Costs will abide the result.

APPELLATE CIVIL.

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March 18.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight, Mr. Justice Tyrrell, and Mr. Justice Mahmood.

WALI AHMAD KHAN AND OTHERS (DEFENDANTS) *v.* AJUDHIA KANDU (PLAINTIFF).*

Possession—Ejectment—Suit in ejectment on a possessory title—Act I of 1877, *(Specific Relief Act) s.* 9.

Per EDGE, C. J., STRAIGHT *and* TYRRELL, J. J, (MAHMOOD, J., *dissentiente*).

Section 9 of the Specific Relief Act is intended to provide a special summary remedy for a person who, being, whatever his title, in possession of immovable property, is ousted therefrom.

* Second Appeal No. 879 of 1888, from a decree of G. J. Nicholls, Esq, District Judge of Gházipur, dated the 17th March 1888, reversing a decree of Munshi Matadin, Munsif of Ballia, dated the 2nd September 1887.

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That section does not debar a person who has been ousted by a trespasser from the possession of immovable property to which he has merely a possessory title, from bringing a suit in ejectment on his possessory title after the lapse of six months from the date of his dispossession. *Davison* v. *Gent* (1); *Asher* v. *Whitlock* (2); *Wise* v. *Ameer-un nissa Khatoon* (3). *Pemraj Bhavaniram* v. *Narayan Shivaram Khuti* (4), *Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar* (5) and *Muhammad Yusuf* v. *Sukh Nath* (6) referred to.

Per MAHMOOD, J.

A person who is suing upon a merely possessory title to recover possession of immovable property against a person who has ousted him must bring his suit, if at all, under s. 9 of Act I of 1877, and therefore within six months from the date of his dispossession.

THE facts of this are fully stated in the judgments of Edge, C.J., and Mahmood, J.

Mr. *Abdul Rauf* and Mr *Abdul Jalil*, for the appellants.

Munshi *Kashi Prasad* and Pandit *Sunder Lal*, for the respondent.

MAHMOOD, J.—I regret that in consequence of the course which this litigation has taken, it is necessary for me to deliver a longer judgment than I should otherwise have considered necessary.

The suit is one of small pecuniary valuation, but the points which arise in it are important and it can scarcely be doubted that it was in view of this circumstance that the learned Chief Justice and myself by our order of the 22nd May 1891, referred the case to a Bench consisting of five Judges. The case has accordingly been heard by a Bench consisting of all the members of this Court.

The facts of the case are to be considered with reference to the pleadings of the parties, and I shall therefore begin with those pleadings, because without fully appreciating them it is scarcely possible to appreciate the points of law to which the circumstances of this case have given birth.

Now the first matter to consider is the exact effect of the allegations in the plaintiff's plaint, and to deal with those allegations

(1) 26 L. J., Exch., 122.
(2) L. R. 1 Q. B., 1.
(3) L. R., 7 I. A., 73.
(4) I. L. R., 6 Bom. 215.
(5) I. L. R., 8 Bom., 371,
(6) Weekly notes, 1887, p. 55.

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with reference to the property now in suit. The property in suit, as also the reliefs sought by the plaintiff, are best represented by the plaint itself.

The land in suit measures 1 biswa 7½ dhurs in plot No. 46 in the *abádi* area of mauza Sagarpani, and of this area the possession is sought by the plaintiff with a prayer that the defendants should be ejected from such land.

Upon the land thus in suit, and this being the solitary area to which the litigation relates, it was alleged in the plaint that there stood a mosque built by the defendants some time about the 21st October 1881, and in that plaint it is also alleged that such building of the mosque took place without the consent of the plaintiff and in collusion with the zamíndárs of the village. This appears from the statement contained in the third paragraph of the plaint. Upon this allegation the relief sought in clause (1) of the prayers in the plaint for relief was that the mosque should be demolished, as the defendants had no right in the land upon which they had built the mosque.

The second relief sought by the plaintiff was the recovery of a sum, approximately Rs. 81-8, as damages mentioned in clause (*b*) of the prayer for relief in the plaint.

The third relief sought in the plaint was that the costs of the suit, together with interest, should be awarded to the plaintiff.

I have dwelt upon the exact scope of the prayers in the plaint in this detailed manner, because I think that it is important to realize the scope of the action.

For similar reasons I consider it necessary to state the pleas upon which the action was resisted. It was resisted mainly upon the following grounds:—

(1) That the land in suit did not belong to the zamíndárs of the village under whom the plaintiff claimed, but formed part of the premises belonging to the mosque in which the defendants were interested according to law.

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(2) That the plaintiff could therefore have no title to the land; at least no such title to the land as could be derived from the zamíndárs.

(3) That the defendants' possession of the land in suit had been older than the prescriptive period of 12 years, and that therefore neither the plaintiff nor the zamíndárs could have any title to the land and that the mosque sought to be demolished was built so long ago as 1873. This last plea was raised in para. 3 of the written statement of the defendants.

(4) That the lease under which the plaintiff claimed could not include the land in suit, because no such lease was ever given by the zamíndárs, and this statement occurs in para. 2 of the defendants' written statement.

Upon this state of the pleadings the Munsif, Munshi Matadin, framed issues represented in his judgment of the 2nd September 1887, and I refer to his judgment to render the facts of the case intelligible.

Upon the pleadings as already stated by me it is clear that it rested upon the plaintiff who sued to oust the defendants to prove his title for seeking such ouster, coupled as that prayer is with the demolition of the mosque, because, to put the matter upon the broad juristic sense, it is for him who seeks a change to show why the change he seeks should be made. This is not only a rule of law, but also of every ratiocinative science in connection with such problems. It therefore lay upon the plaintiff to prove the reason why the defendants should be ousted; why the mosque and other buildings sought to be demolished should be demolished; why the damages claimed should be awarded. The desire of the plaintiff was to disturb the state of things as it existed on the 21st March 1887, when this suit was instituted, and of the defendants that it should remain undisturbed. The suit must be defeated unless the plaintiff shows such a cause as would require a Court of Justice at the date of the suit to disturb the state of things as they were on that date.

I am afraid I have spoken too abstractly in enunciating this doctrine of jurisprudence, and it will therefore be easier for me to

explain the application of that doctrine to the circumstances of this case by making reference to concrete facts as they have been found in the case itself.

The first question in the case is, whether Ajudhia, the plaintiff-respondent, ever had a title to the land of which he claims possession or any right to seek the other reliefs by demolishing the mosque and recovering damages which he sought in the plaint.

The question then is, what is his title? The title asserted by him is not one of ownership, but an alleged lease from the owners, whom he asserts to be in collusion with the defendants. Where is the lease? It has been found that there is no written lease, and therefore, naturally enough, it is not upon the record. His title therefore necessarily rests upon oral evidence.

I seriously doubt whether, as a simple question of law, a lease of property such as the one in dispute in this case can, under the principles enunciated by the Transfer of Property Act, be orally granted, unless it be for agricultural purposes. But I let this matter pass.

I am aware that it is not the duty of this Court as a Court of second appeal to examine the weight of evidence whether oral or documentary in cases which come up before us in second appeal under s. 584 of the Code of Civil Procedure. I am also aware that this principle has been recognised, not only by Her Majesty's High Courts of Judicature in India, but also by their Lordships of the Privy Council. But I think also that it is the duty of this Court when dealing with second appeals and in considering conclusions at which the lower appellate Courts have arrived to consider whether or not those conclusions have been arrived at in due compliance with the rules of law governing the admissibility of evidence, and which involve questions of the burden of proof, especially in cases in which a title is asserted by a plaintiff who seeks to oust a defendant and that defendant denies the title and asserts that the plaintiff has no title at all.

It is with reference to this view of the law that I wish to quote a few passages from the judgment of the Munsif, Munshi Matadin,

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as to his conclusions upon the evidence which he had before him, upon the pleadings of the parties and upon the issues which he framed. After having framed those issues, which are clear enough in the judgment of the Munsif himself, he went on to say:—

"There is no sufficient proof for the plaintiff that he held possession all along of the land in dispute under an arrangement by the zamíndár, and that during the period alleged by him the defendants built the mosque, &c."

Again he says:—"The evidence of the defendants' witnesses proves to the Court's satisfaction that the mosque and shed, &c., in dispute are old and have existed for more than 12 years, and that the land in dispute is possessed by the defendants themselves."

With reference to the locality, after stating that he had deputed two amíns to prepare the map of the locality, he goes on to say as to the plaintiff's allegation regarding possession:—

"On the other hand, it appears from the map prepared by the Court amíns that to the south of the mosque there are the platform for keeping *tazias* and houses belonging to the defendants and others, and then there is the manufactory of the plaintiff, and that the mosque, &c., in dispute are exactly in front of the defendants' platform for keeping *tazias* towards the north. It can by no means be supposed that at this place the plaintiff held possession of any portion of land. So far as this Court can consider, the present suit of the plaintiff appears to be entirely malicious and cannot justly be allowed to prevail."

Upon this finding the Munsif dismissed the suit *in toto*. The plaintiff thereupon appealed to the learned District Judge, who, though recording emphatic findings in his judgment of the 17th March 1888, does not appear to have fully appreciated the exact area of the land in suit or its exact identity. Nor does he seem to have fully appreciated the scope of the relief prayed for in the plaint, for that relief included a prayer for the demolition of the mosque, which, according to the plaintiff's own allegation in the plaint (*vide* para. 3 of the plaint), was constructed as long ago as

the 21st October 1881, and according to the defendants' allegation as long ago as 1873.

The learned Judge's judgment contains many indications that he confused plot No. 38 with the land now in suit, which, as stated by me, is 1 biswa 7½ dhurs in plot No. 46, and on which the mosque sought to be demolished stands, and which is the solitary subject-matter of the suit so far as it seeks ejectment (*vide* relief in the prayer for relief in the plaint).

The learned Judge, however, found that the possession of the plaintiff was disturbed when he put upon the land a stack of wood for fuel and that fuel was removed by order of the Magistrate who granted, to use the words of the learned Judge himself, a perpetual injunction some time about the 28th July 1886, prohibiting the plaintiff from stacking the fuel upon the land now in suit. After the doubt which I have expressed as to whether the learned Judge realized the identity of the land, it is not necessary for me to rule whether that finding as a question of fact was or was not right.

Upon this state of things, the case came up before me in second appeal sitting as a Single Judge in this Court on the 3rd July 1889, and I felt then, as I feel now, that the judgment of the learned District Judge from which the second appeal had been preferred proceeded upon a confusion and misapprehension as to the identity of the property in suit, and also therefore as to the facts which required determination by a Court of first appeal.

In consequence of this circumstance I disapproved of the somewhat emphatic findings of fact arrived at by the learned District Judge and remanded the case under s. 566 of the Code of Civil Procedure for clear findings upon the following points :—

"(1) What are the exact terms of the lease upon which the plaintiff comes into Court, and do those terms entitle the plaintiff to maintain an action in ejectment by demolition of the buildings erected by the defendants ?

"(2) For how long have the defendants been in actual possession of the land, and what has been the nature of such possession

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as against the zamíndár from whom the plaintiff is the leaseholder"?

It has been contended before the Full Bench that this order of remand was wholly unnecessary, because the findings of fact at which the learned District Judge had arrived were sufficient to dispose of the rights of the parties, so as to render them unamenable to judicial interference by this Court as a Court of second appeal under s. 584 of the Code of Civil Procedure, and in support of this contention certain authorities were cited to which special reference is not necessary, because they are familiar.

Upon the remand order which I thus made the case went back to the lower appellate Court, at which time the presiding officer was another Judge. Mr. Fox was then officiating in that appointment. That learned Judge, by his finding dated the 17th August 1889, sent up the case again, and among those findings is the following passage:—

"The defendants' possession is not alleged to be permissive; such as it is, it is adverse to the zamíndár and his lessee the plaintiff. I find that the site of the mosque building proper (*vide* plan) has been in defendants' possession since 1881, and the rest of the land since 1886. I observe that Mr. Nicholls, though he 'affirmed the appeal,' did not order the destruction of the mosque building. His judgment is somewhat obscure on this point. Plaintiff did not appeal respecting the *site* of the mosque."

Now this finding is the reason, and a necessary reason, why it was necessary for me sitting here as a Judge in second appeal to ascertain whether or not the learned District Judge had understood the identity of the land which was in dispute. That was the reason why the remand order made by me on the 3rd July 1889 was made.

The facts stood thus, that whilst Mr. Nicholls as District Judge confounded plot No. 38 with the property now in suit, namely, plot No. 46, and of that plot 1 biswa 7½ dhurs, the next District Judge in dealing with it held that the property on which the

mosque stood and which formed the subject-matter of the litigation had, as in the quotation which I have given, been in the possession of the defendants at least since 1881, and the rest of it since 1886.

To the findings thus returned by Mr. Fox neither of the parties to the litigation consented, because I find that both the parties presented objections under s. 567 of the Code of Civil Procedure to those findings.

Upon this state of things I had to consider the case in the Single Bench, and I find for the reasons stated in my order of the 17th December 1889, I thought that the case required reference to a Bench consisting of two Judges. The rules of the Court at that time permitted such reference, notwithstanding the fact that the Single Judge had made an order of remand.

The case accordingly came on for hearing before the late Mr. Justice Brodhurst and myself, sitting as Judges of a Division Bench of this Court consisting of two Judges, and by our order of that date we concurred in remanding the case again under s. 566 of the Code of Civil Procedure for clear findings as to the terms of the lease upon which the plaintiff's suit was based, and, as my judgment in that case shows, for specific information as to what I said in that judgment with reference to the issue which was remanded on the former occasion. I said this :—"The object of the issue was to have full information in connection with the terms of the lease, that is to say, the time when the lease was executed, the terms on which it was given to the plaintiff, the exact area to which such lease related, as to whether or not it included the land now in suit, and other circumstances connected with what are called the terms of a document."

The case was accordingly remanded, with the concurrence of the late Mr. Justice Brodhurst, upon those issues, and, if I remember rightly, the explanation of the issues was suggested by him to me.

Upon this issue being remanded, the present learned District Judge, Mr. Pennington, has recorded findings the effect of which is that there is no proof that the plaintiff ever held any lease from the zamíndárs ; that there is no proof that the payment of rent alleged

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by him in the plaint was ever made; that there is no proof that he was ever in physical possession of the land in suit. The learned Judge sums up his finding in the penultimate paragraph of his order. He says:—"My finding on the issue remanded is that if there were an oral lease in 1280 Fasli as alleged by plaintiff (which is doubtful) it included the area of the land now in suit, but that it was not a lease in perpetuity nor for any fixed term, and that plaintiff can have no claim against defendants on this lease."

This finding, so far as it relates to questions of fact, is in my opinion a finding binding upon this Court as a Court of second appeal, but it is not binding upon this Court over questions of law which arise from it and that question is a serious one.

It is this. Is there any such thing as possessory title known to the Indian Law, and, if it is, where is the authority for such a title? Such a title was practically unknown to the Indian Law till the considerations which required the enactment of s. 15 of Act XIV of 1859 necessitated that such a title should be recognised, in order to keep the peace and to prevent parties from ousting persons in possession by force or fraud. Now this enactment of s. 15 of Act XIV of 1859 has been the subject of interpretation by their Lordships of the Privy Council, and they have held that because possessory title is intended for these purposes no such possessory title shall enable the plaintiff to come into Court to seek remedy by ouster, unless such claim is brought within six months as provided by s. 15 of Act XIV of 1859. That ruling is in the case of *Wise* v. *Ameer-un-nissa Khatoon* (1).

That case also is an authority for saying that whenever a possessory title is made the basis of a claim such as this and is brought after the lapse of six months, such a title is not to be listened to, because there has been too much delay for relying upon such a title.

Another point upon which also their Lordships of the Privy Council have delivered their judgment is that the ordinary rule of burden of proof as to ownership is not to be disturbed except under the statutory provisions as to possessory title to which I have

(1) L. R. 71 A, 73.

already referred. Those provisions have now been reproduced as s. 9 of the Specific Relief Act (I of 1877), but they do not in my opinion alter the law, for s. 15 of the Limitation Act (XIV of 1859) was unjuristically placed in the old Limitation Act, though it deserved a place in an enactment which related to Specific Relief. One thing, however, is clear, that in both these enactments, whether Specific Relief be regarded as a subject falling under the category of substantive law or a subject relating to adjective law, the period of six months is a necessary incident before any possessory title can be asserted as the basis of an action for ejectment. This view has been repeatedly adopted by the High Courts in India, and it is fully supported by the rulings of the Privy Council.

This being so, it is important to consider the date of the suit, which was the 21st March 1887, and then the date of the ouster by the defendants which, so far as this plot, No. 46, is concerned, took place some time, according to the plaintiff's own statement, in 1881. The suit was therefore undoubtedly beyond the six months period allowed by s. 9 of the Specific Relief Act.

This being so, the next question to consider is, that, inasmuch as the possessory title cannot be pleaded as the basis of the action in ejectment, whether the ordinary rule of law as contained in s. 110 of the Evidence Act would not apply. In my opinion, under the circumstances of this case, considering that the ouster from the land now in suit is admitted to have been so old as 1881, and also in view of the circumstance that the suit was not instituted until the 21st March 1887, the ordinary presumption of law, that he who is in possession of land owns it, applies, and such presumption cannot be abrogated by any statement or proof, even of such facts as that of forcible or fraudulent ouster anterior to six months from the date of the suit.

The ruling of *Asher* v. *Whitlock* (1) has been cited as an authority for a proposition opposite to the view which I have taken in this case, but that ruling in my opinion cannot in the first place, abrogate the statutory provisions of s. 9 of the Specific Relief Act (I of

(1) L. R., 1 Q. B. 1.

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1877), nor can it apply to India if the argument is that it applies in a manner which abrogates the statutory law. The principle recognised there is that a forcible or fraudulent ouster by a defendant will not enable him to shift the burden of proof as to ownership or title on to the wrong party. That doctrine, so far as it goes, is sound, and has been adopted by their Lordships of the Privy Council in the case of *Sundar* v. *Parbati* (2), and from that ruling it is not possible for me to differ. I regard that ruling as represented in the report itself as one which is binding upon this Court, but that ruling does not apply to the case here.

Here the action, as I said before, was one in ejectment. The broad effect of the defence is that the plaintiff had no title; that those under whom he claims have no title, and that the very lease never existed, and the finding of the lower appellate Court is entirely in favor of the defendants.

I only wish to add a few words as to this order of remand made by me in the Single Bench on the 3rd July 1889. That order was made because I thought, and still think, that Mr. Nicholls had not understood the case and that he had therefore confounded the identity of the property in suit. It was also made because the judgment of the learned Judge was not in accordance with the requirements of s. 574 of the Code of Civil Procedure.

Then as to the second remand order, namely, the one made by Mr. Justice Brodhurst and myself, on the 24th April 1890, I wish to say that my honorable colleague and myself had fully apprehended the difficulties of the case when that remand order was made, and that the second remand was necessary because of the finding of the lower appellate Court being again inadequate to prove anything other than a possessory title in the plaintiff. Such a possessory title, as I have said, cannot rest longer than six months according to s. 9 of the Specific Relief Act. The suit was instituted after six months of the alleged dispossession; the land was in the possession of the defendants ever since 1881, and it had been the subject of litigation between the parties with the result that the plaintiff's stack of wood

(2) I. L. R., 12 All., 51.

was removed by the Magistrate's order on the 18th July 1886, and that the possession of the defendants had, even from that date, been anything other than that obtained by force and fraud, because the possession was obtained under the order of the Magistrate and it was peaceably obtained, and it was so retained till this suit was brought, and such a suit being later than six months from the ouster alleged in the plaint could not therefore be entertained as a possessory suit.

I am of opinion that upon this state of things this appeal should prevail; that the decree of the lower appellate Court should be set aside, and that the decree of the Court of first instance dismissing the suit should be restored with costs in all Courts. I would order accordingly.

EDGE, C.J.—My brother Mahmood has given as his reasons, for the reference of this case to the Full Bench of the whole Court, that it involved questions of law of great difficulty and importance. Speaking entirely for myself, I did not consider that there was any question of law in the case involving the slightest difficulty. This case was heard before my brother Mahmood and myself on the 21st instant, and at the rising of the Court it stood adjourned for judgment. On the morning of the 22nd my brother Mahmood informed me that we differed, and it appeared that we differed in fact as to the legality of these orders of remand, also as to the construction and effect of s. 9 of the Specific Relief Act, and further as to the right of a person having a title by possession to maintain a suit of ejectment against a person who was a pure trespasser and had ejected the person having that possessory title. In my humble judgment those questions were easy of solution, but, inasmuch as there was this difference, my brother Mahmood wished the case to be referred to the Full Bench, and I agreed to refer it.

I regret that I should be unable to follow my brother Mahmood into many of the matters to which he has alluded this morning in his judgment, many of the considerations inducing him to make the orders of remand, as those matters were not suggested by either of the orders of remand which he made, or during the course of the

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argument, in this case, or until this morning when my brother Mahmood proceeded to deliver his judgment.

Let us see what this case is. It is a suit brought by one Ajudhia Kandu, a Hindu, against certain Muhammadans; and in that suit the plaintiff alleged that the defendants had wrongfully built upon land that was in his possession as tenant and had ousted him, and that they had at a subsequent period thrown out walls and enclosed other portions of the plaintiff's holding. The plaintiff alleged that he was a tenant of the zamíndárs and held under them. The defendants, on the other hand, set up a title in themselves, their case being that on the land in dispute their ancestor had erected a hut or house and had lived in it, and that the plaintiff never had had possession of any of the lands in suit. Now that was a very simple case to try. It was a case in which, according to my view of the law, the plaintiff could rely on proof of a letting by the zamíndárs to him, and if he failed to prove such a letting he could rely on the fact of his possession anterior to that of the defendants, and, if he established that anterior possession, then upon the fact of their wrongful entry upon the land, they having no lawful right to do so. The question of the defendants' title was also an easy matter for consideration, and the plaintiff having proved *primâ facie* title, either as lessee or as a person who was in recent possession until ousted by the defendants, it was then for the defendants to prove a title which entitled them to eject the plaintiff and thus to establish that their entry upon the land was rightful.

The suit was brought on the 21st March 1887 in the Court of the Munsif of Ballia. It was decided by the Munsif on the 2nd September 1887, the Munsif finding against the plaintiff and dismissing the suit. Thereupon the plaintiff, on the 1st November 1887, appealed to the Court of the District Judge, and in that appeal he did not claim demolition of the *masjid*: that is quite plain. He did not claim possession of the land on which the *masjid* stood: that also was plain, and was plain apparently to my brother Mahmood when he made the first order of remand. The plaintiff did claim in appeal to have possession given to him of the land

adjoining the *masjid*, which he alleged the defendants had wrongfully entered upon and surrounded by a wall after his, the plaintiff's, fuel had been removed from that land.

There was another point. It is in no way admitted that the defendants had been in possession of the land with which we have to deal and which my brother Mahmood in second appeal had to deal with, that is, the land adjoining the *masjid* and on which the plaintiff had stacked his fuel. I say it is no way admitted that the defendants were in possession of this land since 1881. As a matter of fact the plaintiff's fuel was removed from those lands, as has been found, under the order of the Magistrate, dated the 18th July 1886, and it was subsequently to that removal that the defendants wrongfully went on the land and enclosed it. The District Judge on appeal, dealing properly with the subject-matter of appeal which was before him and discarding the matter in the suit which was not before him, namely, the question of the land upon which the *masjid* stood, confined his attention to the question as to who was entitled to the land adjoining the *masjid* which was ear-marked as the land upon which the plaintiff had stacked his fuel, which stack was ordered to be removed by the order of a Magistrate on the defendants' complaint that it was adjoining the *masjid* and there was danger from its vicinity; so that, if there was confusion in this Court, in the Court of first appeal there was no confusion as to the plot of land which was in dispute in appeal between the parties.

Now the District Judge, I must say this in vindication of his judgment, made no confusion as to numbers. There was a reference to several old papers and maps. The District Judge pointed out that on the old village maps the boundaries of properties were very carelessly entered, and what he did confine his attention to was, who was entitled to the land which was ear-marked as the land adjoining the *masjid* upon which the plaintiff's stack of fuel had been?

What took place before him? The right and title of the zamíndárs to dispose of the land in question was not questioned before the District Judge. It was not disputed and it had never been suggested before him, or in this Court until yesterday, that any

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question was in issue still as to the right and title of the zamíndárs to dispose of the land and put the plaintiff in possession. It was not a point, as I shall show hereafter, which apparently was present to the mind of my brother Mahmood when he made his first or his second order of remand. If it was present to the mind of my brother Mahmood, it was not one of the reasons suggested in those orders of remand for making them, nor was it a question inquired into in those orders of remand.

Let us see how Mr. Nicholls, the District Judge, dealt with this case. His finding, so far as it is necessary to refer to it, is as follows :—

"I consider it fully proved that the land claimed was let to plaintiff by the zamíndárs who had power so to dispose of it. I consider it fully proved that, till the order of the Deputy Magistrate to remove the fuel stack, the plaintiff was stacking his fuel on the empty space between the *masjid* and the house of Durga and Bhikhari, Koeris, and I hold it to be fully proved that as soon as the defendant saw the fuel removed, he wrongfully enclosed the space between the standing *masjid* and the houses of those two Koeris and built a *saiban* on plaintiff's ground and to the south put up fictitious cattle troughs and the like."

Then he goes on, and we know what his decree was :—

"Reversing the finding of the lower Court, I decree the claim of the plaintiff in full as regards the demolishing of the walls and recent erections. The whole of what lies east and south of the *masjid* as it stood on the 16th July 1886, is to be restored to the condition it was then in. The appellant generously gives up his money claim for damages and previous costs. These parts of his claim and appeal stand dismissed."

That was the decree and judgment against which the defendants appealed here. It was not possible on that appeal to raise any question as to the *masjid* or the site on which the *masjid* stood. That point had not been gone into by the District Judge, and he had given no decision on that, because it was not before him. The

whole question before this Court in second appeal was the question whether on those findings of fact the plaintiff had made out his right to a decree for possession and for demolition of the walls wrongfully built by the defendants since 1886. It was not open to the defendants-appellants in second appeal to question those findings of fact, unless they were in a position to show that there was no evidence upon which the District Judge could have come to those findings and then it would have become a question of law No such ground of appeal was put forward, and it was obvious that if any such ground had been put forward it would have been a false one. There was evidence before the District Judge, he refers to it in his judgment, and he finds that that piece of land was let to the plaintiff by the zamíndárs and he finds that it was occupied down to the 18th July 1886, by the plaintiff stacking his fuel upon it, and he finds that neither the defendants nor any one on their behalf ever entered upon that land until the defendants took the opportunity of wrongfully making entry upon it after the passing of the Magistrate's order for the removal of the fuel. We must not let this case be confused by extraneous matters. It is well to remember that the order of the Magistrate was not an order dealing with title. It was an order passed on the complaint of the defendants that by reason of the stacking of fuel by the plaintiff there was danger to the *masjid*. The Magistrate on being satisfied that there was such danger properly made that order.

Then for the first time on the making of that order the defendants took the opportunity of encroaching upon their neighbour's grounds. The defendants appealed to this Court. It was an appeal which could be heard by a Single Judge. I am bound to say that on these findings of fact I cannot conceive what point of law there was which could be argued in appeal on behalf of the defendants. The findings of fact were conclusive on this Court, and on those findings of fact there could be only one answer in law, and that was judgment for the plaintiff confirming the decree below with possession. However, my brother Mahmood made an order of remand. He tells us to-day that that order may have been made

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because the Judge below had not complied with the provisions of s. 574 of the Code of Civil Procedure, and that it may have been made on the ground that Mr. Nicholls may have been mistaken as to the identity of the land which was in dispute between the parties. In matters of this kind it is always unsafe, I am speaking from my own experience, to rely upon one's memory as to what was passing through one's mind nearly two years before. In order to ascertain what were the reasons for the remand and what was the view my brother Mahmood then took as to appeal before him, I may refer to the actual words he used in his order of remand of the 3rd July 1889. That order of remand is as follows :—

"The plaintiff-respondent came into Court upon the allegation that he was the lessee from the zamíndár of the village in which is situate the land in suit. The plaintiff's allegation was that in his lease the land was included, and that the defendants resisted him placing fuel on the land, and that, such fuel having been removed by the order of the Criminal Court, dated the 18th July 1886, the defendants took advantage of the order and raised a wall, claiming the land to form the courtyard of the mosque situate in immediate vicinity of the land. The ouster is stated to have occurred between the 28th July 1886 and the 15th September 1886. The present suit was instituted on the 21st March 1887, and it was resisted upon the ground that the land in suit did not belong to the zamíndár of the village, but formed part of the premises belonging to the mosque in which the defendants were interested, and, secondly, that the plaintiff could therefore have no title to the land, and, thirdly, that the defendants' possession had been older than the prescriptive period, and therefore neither the plaintiff nor the zamíndár could have any title to the land. It was also pleaded that the lease under which the plaintiff claimed did not include the land in suit. The learned Judge of the lower appellate Court has recorded findings in certain incomplete terms. In the first place he says :—'I consider it fully proved that the zamíndárs had the right to dispose of the waste land as they allege they have done. There is absolutely no evidence (the parole evidence of the defendants is beneath criticism) that the land in dispute ever formed part of the *masjid* or of the

masjid precincts. There is evidence, poor in quality, that before the *masjid* was built, Zorawar, grandfather of defendant, had a thatched hut on the spot, but there is no evidence at all that the limits of his site extended an inch beyond what is now covered by the *masjid*.' After these observations the learned Judge goes on to say—'I consider it fully proved that the land claimed was let to plaintiff by the zamíndárs who had power so to dispose of it; I consider it fully proved that, till the order of the Deputy Magistrate to remove the fuel stack, the plaintiff was stacking his fuel on the empty space between the *masjid* and the house of Durga and Bikhari, Koeris, and I hold it to be fully proved that as soon as defendant saw the fuel removed he wrongfully enclosed the space between the then standing *masjid* and the houses of those two Koeris and built a *s ihan* on plaintiff's ground, and to the south put up fictitious cattle troughs and the like.' These findings appear to me to be findings of fact which tend against the defendants, but before disposing of the case finally it is necessary to have clear findings upon the following points:—

(1) What are the exact terms of the lease upon which the plaintiff comes into Court, and do those terms entitle the plaintiff to maintain an action in ejectment by demolition of the buildings erected by the defendants?

(2) For how long have the defendants been in actual possession of the land, and what has been the nature of such possession as against the zamíndár from whom the plaintiff is the lease holder?"

To take the last issue first. There was a clear findnig that the defendants had failed to make out their case that the land which they had attempted to prove that their ancestor had occupied was the land which was in dispute before the District Judge. As to the first issue, I fail to see what the terms of the lease had got to do with this matter. The finding was, lease or no lease, as a fact that the zamíndárs had got a right to let and put the plaintiff in possession and the plaintiff had occupied that land up to the 18th of July 1886. It was not suggested by the defendants that the

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plaintiff held a lease which was forfeited, or that he had been ejected from the land by his landlord. There was no issue raised which could make it a matter of consideration between the plaintiff and these defendants what the terms of that lease were. The lease may have been void and indefinite, and it may have been open to any and every objection on the part of the zamíndárs, if the zamíndárs were defending this suit; but I fail to see how a person who is found to have wrongfully and without any title come on to the land of another can challenge that man's title and say "show me the terms of the lease upon which you hold."

The case went down on remand. Unfortunately, on the first issue the order which went down referred to "relief" instead of "lease" and that led to some confusion in the Court below. The then District Judge, Mr. Fox, made findings and reported them to this Court. The case was then again remanded by my brother Mahmood and the late Mr. Justice Brodhurst to the District Judge. It came then before Mr. Pennington who was then acting as District Judge, and Mr. Pennington went into the matter and he returned his findings. Those findings were returned on the 12th June 1890, and those apparently are the findings upon which in my brother Mahmood's opinion he would give a judgment in favor of the defendants-appellants in this case.

I must say, speaking entirely for myself, that I do regret that any local dispute between a Hindu and some Muhammadans should have been kept alive in that district over all these years by those orders of remand, which appear to me to have been not only unnecessary, but not justified, this being a second appeal, by s. 566 of the Code of Civil Procedure. What is the power of the Court under s. 566 to make an order of remand in a second appeal? Before considering to that section, it is well to bear in mind that the Code of Civil Procedure prohibits a Court in a second appeal from questioning the findings of fact of the lower appellate Court unless there is no evidence or, what is the same thing, no admissible evidence in support of them. Their Lordships of the Privy Council have said more than once in unequivocal language that that is the

law, and the Courts in this country in second appeal are debarred from questioning, in any form, shape, or way, the findings of fact, when there is evidence in support of them, no matter how erroneous in the opinion of the Court those findings may be. One has to bear that in mind when one has to consider the power of the Court under section 566 of the Code. Section 566 is as follows :—

"If the Court against whose decree the appeal is made has omitted to frame or try any issue, or to determine any question of fact which appears to the appellate Court essential to the right decision of the suit upon the merits, the appellate Court may, if necessary, frame issues for trial, and may refer the same for trial to the Court against whose decree the appeal is made, and in such case shall direct such Court to take the additional evidence required.

"And such Court shall proceed to try such issues and shall return to the appellate Court its finding thereon together with the evidence."

It is obvious from that section that a Court in second appeal cannot make an order of remand which tends to question the findings of fact of the lower appellate Court. A Court of second appeal frequently, no doubt, would have come to a different conclusion as to the facts from that which was come to by the lower appellate Court. But, because we are not satisfied with those findings and because they are not findings which we should have come to, we would not be justified in making an order of remand which would re-open questions of fact which have already been found by the lower appellate Court. And further it is obvious that an order of remand should not be made if the findings of fact of the lower appellate Court, rightly or wrongly, dispose of the issue before the Court. It is no part of our business to hunt about and find means by which we may upset a decree and decision of the lower appellate Court of which we do not approve. Now I have come to the conclusion that these various remands not only were unnecessary, but that they were practically and in fact a violation of the principle that we should not in second appeal interfere with the findings of fact of the lower appellate Court. I pointed out that

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on those findings of the lower appellate Court, no question would have arisen as to the area of the land. It was found that land was let by the zamíndárs. No question could have arisen as to the terms of the lease. It was not suggested that any lease was determined except by the wrongful act of the defendants and that could not determine the plaintiff's title. Under these circumstances, in my judgment we are bound to decide this case on the findings of fact which were come to by Mr. Nicholls as far back as the 17th March 1888, and to discard the findings of fact, although I think they are immaterial, which were come to on the subsequent orders of remand.

I do not think, for myself, that, strictly speaking, it is necessary to consider at all the construction and meaning of s. 9 of the Specific Relief Act, or the question whether a person who has merely a title by possession can maintain a suit for ejectment against a person who subsequently comes upon the scene and without any title in himself disturbs the plaintiff from the possession which he was enjoying, such as it was, because on the record there is the finding of fact of Mr. Nicholls that the plaintiff was in possession until he was disturbed by the defendants, and that he was in possession as tenant to the zamíndárs who had authority to dispose of the land. However, as the question has been raised by my brother Mahmood it is as well for us to consider it and dispose of it once for all, so far as this Court is concerned. I do not propose to go at any length into the authorities on that point; I shall leave that question to be dealt with by one of my brother Judges who is more familiar with the authorities than I am. But I wish to express views of mine on the point which I have expressed on several occasions. Section 9 of the Specific Relief Act was a section which, in my humble judgment, was passed in order to prevent persons ousting a man from possession except by due process of law, and it was intended that under that section a suit might be brought within six months, and the person ousted be put into possession no matter what title he had. It was a section the object of which was to drive persons who wanted to eject a person into the proper Court and prevent

them from going with a high hand and ejecting such person. That section has nothing to do with a suit on title for possession. The section itself says in one of its paragraphs—"nothing in this section shall bar any person from suing to establish his title to such property and to recover possession thereof."

It is merely a section which enables a man to come into Court and be put back into possession, if, although he had no title, he was actually in possession, notwithstanding what title the other person may prove. It does not suggest for one moment that a man who had a possessory title should be compelled to bring his suit under that section or not at all.

With regard to the right of a person who is in possession to remain in that possession until he is ejected by a person with superior title, the cases in England are consistent. There are several cases to the same effect in this country and their Lordships of the Privy Council have quite recently recognised the fact that a mere simple title of possession, there being no other title at all, is sufficient to enable the person to maintain a suit against a person who has got no better title; and it stands to reason that it ought to be so. It would in my judgment be contrary to justice, equity, good conscience, and common sense to hold that a man who had been, for instance, for eleven and half years in quiet and undisturbed possession of land to which he had no right except his title by possession might be disturbed by a stranger going along the road coming in and ejecting him, such stranger not having any title whatever to the land. It would be contrary to common sense to say that the man so ejected should be limited in his right to bring his suit by s. 9 of the Specific Relief Act. It would be depriving him of a right which is enjoyed by all the subjects of Her Majesty, a right of vindicating their rights to property of which they have been wrongfully dispossessed. It certainly cannot lie in the mouth of the defendants in this case who had no title at all, to say, "you have got no legal title, and therefore I was entitled to come in and turn you out." That would amount to saying that a person who has possessory title can be turned out by an absolute stranger who

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has no title at all. I would therefore dismiss this appeal with costs.

STRAIGHT, J.—As one of the Judges who has been called in in consequence of the difference of opinion between the learned Chief Justice and my brother Mahmood I desire to make a few observations with regard, first of all, to the order of remand which was originally made when he was sitting as a Single Judge, and, secondly, as to the remarks which have fallen from him to-day, by which it was made to appear that the construction put by my brother Mahmood on s. 9 of the Specific Relief Act is the admitted construction adopted practically not only by all the Courts in India but by the Privy Council.

This suit, which commenced, as we know, in the month of March, 1887, need not be discussed by me as to the shape in which it was precisely presented in the plaint. It is enough for me to consider the precise question which was before the learned Judge in appeal and which he fully considered and which he determined. That question was, whether these defendants having already a mosque or *masjid* erected upon certain land, had encroached from the proper area upon which that mosque was situated on to the land which had been in the possession and occupation of the plaintiff between the months of July and September 1886. The learned Chief Justice has said, and I entirely agree with him, that that was a very simple issue. I am thankful to think that no question of probability was introduced into this case by the learned Judge. It was as probable that the Hindu zamíndár and the original tenant, the Hindu plaintiff, had conspired for the purpose of defeating or injuring these Muhammadan defendants as that these Muhammadans had done an arbitrary and *zabardast* act in inclosing land that did not belong to them. Fortunately, however, these considerations have not been introduced by the learned Judge below. The learned Judge tried the case upon the pure question of fact, namely, was the encroachment alleged by the plaintiff made upon his land or land in his occupation between the months of July and September 1886? The learned Judge has found in plain terms that the encroachment was

made; that the wall was put up; that the *saiban* was erected, and that the land was in the occupation and enjoyment of the plaintiff at the time those acts were done. Of course if a Court of second appeal takes upon itself not to like the findings of fact recorded by a Court of first appeal, it is a very easy process for it to remand the case, and to go on remanding it, until a Judge is found who gives a finding to the liking of the Court of second appeal. I am sometimes dissatisfied with the findings of fact recorded by the Court of first appeal, but I have always felt myself constrained to accept those findings, where there are clear materials in the record from which the Judge might find certain conclusions and where the case is not one of absence of any evidence. The result of unnecessary remands in this case has been that whilst Mr. Nicholls, in the first instance, in most clear and explicit terms found in one way, we have an intermediate remand to another Judge, who gives a somewhat halting reply, and a second remand to a third learned Judge, resulting in that learned Judge taking a different view altogether. How long is this to go on, and when would a Court ever have an opportunity of bringing litigation to a close? I suppose that it was with that feeling s. 564 of the Civil Procedure Code was framed, and a very wholesome provision it is.

I say with the most profound respect to my brother Mahmood that had I been his colleague I should have dissented from that remand, because, in my opinion, it was not only wholly unnecessary, but contrary to the provisions of s. 564. Therefore I concur with the learned Chief Justice that what Mr. Nicholls found as the Court of first appeal before the remands were made must provide the material upon which this appeal must be determined, and behind those findings of fact we to-day cannot go.

It has been said that s. 9 of the Specific Relief Act bears the construction, namely, that which my brother Mahmood has placed upon it. Then the result is this, that a man who has been in peaceable possession of immovable property for a period of 10 years, may, by the forcible entry of an absolute stranger and trespasser, be turned out, and that if he does not bring his suit within six months, the fact

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of his antecedent peaceable possession is no evidence of his title. What is s. 9 of the Specific Relief Act? It only reproduces the rule which says that a person having a right to which wrong has been inflicted, is entitled to come into Court and assert that right. If my brother Mahmood's reading of s. 9 of the Specific Relief Act is correct, then it would be practically precluding the suit contemplated by art. 142 of the Limitation Act. What s. 9 of the Specific Relief Act intended to do, and in my opinion does, is to provide a summary and speedy remedy through the medium of the Civil Court for the restoration of possession to a party dispossessed by another, leaving them to fight out the question of their respective titles if they are so advised. This s. 9 is no more than a reproduction of a provision of the Roman Law by which the prætor was entitled to restore possession to a person who had been forcibly dispossessed of property. It was thought, and wisely thought, that if power was not given to the Civil Courts to afford this speedy remedy, most high-handed and intolerable cases of dispossession might occur, with the result that the intruder, having forced himself into possession, might snap his fingers and say "here I am in possession; prove your title and do your worst." It would neither be justice, equity, good conscience, nor common sense to recognise or tolerate any such doctrine, and I for one decline to do so. In this connection I think it right to refer to the case of *Davison* v. *Gent* (1). There it was remarked by Baron Bramwell—"It may be that the plaintiffs have no right as against Sherwood, and that Sherwood might have a title as against them. But Sherwood is not a party to the suit. The party who has turned the plaintiffs out of possession is sued. The plaintiffs only fail to show that they have a title under a particular person. It is not for the defendant then to ask it to be presumed that he has any title or right to recover. It is for him to prove that he has title or right to recover. It is for him to prove that he has title in answer to the plaintiffs' proof of a prior possession."

The same view is to be found in *Asher* v. *Whitlock* (2) and has recognised in *Pemraj Bhavaniram* v. *Narayan Shivaram Khisti* (3)

(1) 26 L. J., Exch 122. (2) L. R., 1 Q. B. 1.
(3) I. L. R., 6 Bom. 215.

and *Khrishnarav Yashvant* v. *Vasudev Apaji Ghotikar* (1) and in a ruling of this Court to be found in the *Weekly Notes* for 1887, p. 55, *Muhammad Yusuf* v. *Sukh Nath*. My brother Mahmood did not refer in terms to the passage in the Privy Council judgment of which he spoke, which is to be found in L. R., 7 I. A., p. 73 *Wise* v. *Ameer-un-nissa Khatoon*. But, as the Chief Justice of Bombay observed in the case reported in the I. L. R., 8 Bom., those remarks of Sir Barnes Peacock in delivering the judgment of their Lordships of the Privy Council must be read in conjunction with the facts of that very peculiar case. I cannot hold or allow that the course of authority in India has ever been to the effect that s. 9 of the Specific Relief Act debars a person who has not brought his suit within six months of his dispossession from giving evidence of his possession in support of his title. Under these circumstances I have no hesitation whatever in holding that the findings of fact of Mr. Nicholls being accepted, the suit of the plaintiff was rightly decreed, and that the plaintiff was entitled to eject the defendants; and further, that the land being in his possession and the erections being the erections of trespassers, he was entitled to remove them. I agree in the order made by the learned Chief Justice.

TYRRELL, J.—I entirely concur in what has fallen from the learned Chief Justice and my brother Straight.

KNOX, J.—I had proposed to preface my judgment by quoting certain portions of the judgment of the learned District Judge which satisfied me that the lower appellate Court had before it a clear view of the question involved in the appeal and had arrived at a positive finding which disposed of this question. The portions to which I had intended to refer have been given in full by the learned Chief Justice in the judgment which he has just delivered and I do not therefore repeat them. I only repeat that after a careful consideration of the judgment delivered by Mr. Nicholls, I am satisfied both that that learned Judge had properly seised himself of the questions that arose before him in that appeal and that he had pronounced upon those questions findings which disposed of

(1) I. L. R., 8 Bom. 317.

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them. I therefore hold that this Court is precluded by law from going beyond those findings of fact, and the position to which I revert in coming to a decision in this second appeal is the position at which the case stood prior to the 1st July 1889. Reverting to that position I find no question of law involved in the pleas as recorded in the memorandum of appeal, nor indeed did I find any in the argument addressed to me whilst sitting in this Full Bench which properly flowed from those pleas or which bore upon the sole question arising in this case, namely, whether in law the plaintiff had made out his title for possession and demolition of the buildings which have been found wrongfully erected by the appellant. I would therefore, without any reference to or consideration of what has been found by the Judge of Ghâzipur since the 1st July 1889, dismiss this appeal with costs.

Appeal dismissed.

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April 30.

Before Mr. Justice Straight and Mr. Justice Mahmood.

SHER SINGH AND OTHERS (JUDGMENT-DEBTORS) v. DAYA RAM AND OTHERS (DECREE-HOLDERS).*

Execution of decree—Principle of res judicata *as applied to execution proceedings—Rule in Sarju Prasad* v. *Sita Ram—Civil Procedure Code, s.* 373.

Where a judgment-debtor, being entitled and having an opportunity to plead s. 373 of the Code of Civil Procedure as a bar to execution of the decree against him neglects to do so, and the application in respect of which such objection might have been taken is entertained by the Court and orders passed thereon, the principle of *res judicata* will apply to such proceedings, and the judgment-debtor cannot at a subsequent stage of the same execution proceedings object that such previous application for execution ought in fact to have been held to be barred by the operation of s. 373 abovementioned.

The facts of this case sufficiently appear from the judgment of Straight, J.

Mr. T. *Conlan* and Mr. A. H. S. *Reid,* for the appellants.

Munshi *Madho Prasad,* for the respondents.

STRAIGHT, J.—This is a first appeal in execution, and the decree to which it relates was dated the 16th December 1879. That is a

* First Appeal No. 89 of 1888, from a decree of Babu Abinash Chandra Banerji, Subordinate Judge of Aligarh, dated the 28th May 1888.

decree passed upon a mortgage, and was, so I am informed, drawn up in the form then prevailing, providing for the sale of the mortgage property in the event of the amount of the decree not being paid by the mortgagor, judgment-debtor.

The first application for execution was made on the 22nd April 1880, and no further reference need be made to that proceeding. The second application for execution was put in on the 29th January, 1883, and upon it certain proceedings were taken. Among others a report was called for from the office as regards the property sought to be sold, and the pleader for the decree-holder was required to file an affidavit as to whether the property to be sold was or was not ancestral property of the judgment-debtor. A considerable period of time passed without any thing being done, and on the 18th March 1884, the following order was made on this second application of the 29th January 1883:—

"The pleader for the decree-holder stated that his client does not wish to prosecute the case further, it is therefore ordered that it be dismissed for default."

On the 20th March 1884, the third application was put in, and by his petition the decree-holder sought for sale of the property mortgaged. On the 13th May 1884, notification of sale was issued, fixing the 21st July 1884, but the judgment-debtors got time for the payment of the amount of the decree and the sale was postponed. Subsequently fresh notices of sale were issued for the 20th September 1884, when one Kalyan Das put in an objection and asked that one of the properties notified for sale should be sold first, to which the decree-holder, on the 20th November 1884, agreed. On the 5th February 1885, the sale of that property was transferred to the Collector, as it was considered that such property was the ancestral property of the judgment-debtor.

With regard to this application and what was done upon it I may say that it was a real application, according to law, accepted by the Court below, and, as the judgment-debtors were cited, they had an opportunity of being heard and of offering and setting up any

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objections that they might be in a position to prefer to the execution of the decree, amongst them, of contending that the order, dated the 18th March 1884, was a bar to the Court's entertaining the application of the 20th March 1884. No such objection was ever taken, and the very same remarks apply to the application of the 28th May 1886, by which the decree-holder applied for the sale of the mortgaged property. On the 5th June 1886, notice was issued to the judgment-debtors to show cause why the sale should not take place. They did not appear, but two persons, one of them Karan Singh, did appear, and upon his application the proceedings were struck off, as will be seen by an order of the Subordinate Judge of Aligarh dated the 28th July 1886, which is in the following terms :—

"This date was fixed for the hearing of this case. A regular suit has, however, been instituted by Karan Singh. The number of that suit is 141 of 1886. An order has been passed in the said suit for postponement of the sale. No further proceedings can therefore be taken."

The case was then struck off. That order got rid of the application of the 28th May 1886, and on the 9th January 1888, the application with which we are concerned in the present appeal was put in by the decree-holder for the sale of the mortgaged property, and the learned Subordinate Judge has allowed the decree-holder to execute the decree. Two objections are urged by the judgment-debtors before us as to the propriety of that order. The first of these is that looking to the terms of the former order, dated the 18th March 1884, the principle of the case of *Sarju Prasad* and the subsequent rulings of this Court, which adopted and followed it, as set out in the Full Bench ruling, should be applied, and we should hold that that order was a bar to all the subsequent applications that were made, and was a fatal impediment to the decree-holder's subsequent application.

The second point urged by the learned counsel for the appellant is that the execution should have been transferred to the Revenue Court, the property attached being the ancestral property of the

judgment-debtors, and this may be disposed of at once. No such question appears to have been raised before the Court below, nor are there any materials upon this record to guide us in forming an opinion upon it. All I can say is that the Court which has the conduct of the proceedings in execution, that is, the Court below, may, at the instance of the judgment-debtors, if proper materials are placed before it, hereafter decide this question according to law and make such order as appears proper and right.

The first point referred to above is one of great importance, and in order to guard against any possible confusion or misunderstanding as to the means upon which it is in this particular case decided, I think it necessary to explain the grounds upon which I come to the conclusion I have. In my opinion the principle laid down in *Ram Kirpal* v. *Rup Kuari* (1) prohibits me from going behind a formal application for execution of a decree admitted by a Court executing a decree, in which notice has been issued to the judgment-debtors and proceedings from time to time have been taken thereunder in execution of that decree. I concede that the decree-holder in the case might be in a difficulty if the judgment-debtor could go behind the proceedings which were instituted by the application of the 20th March 1884. But in my opinion the judgment-debtor cannot do so. I have already stated and I need not repeat all that was done upon that application. What I wish to emphasize now is that it was a real and substantial proceeding taken by the Court at the instance of the decree-holder, to which the judgment-debtors were made parties, in which orders were made which could only have been made by the Court upon the assumption that what had hitherto been done had been properly done and according to law. It seems to me that the objection on the score of s. 373 of the Code of Civil Procedure cannot be gone into in the present case, and that the argument for the judgment-debtors cannot prevail. I hold therefore that the learned Subordinate Judge was right in the conclusion at which he arrived, though I wish to add this much in regard to the application of the 28th May 1886, that considering the nature of the final order passed in that proceeding it would not, having regard

(1) I. L. R., 6, All, 269.

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to what was laid down in the case of *Fakirullah* v. *Thakur Prasad* (1), have acted as a bar within the meaning of s. 373 of the Code of Civil Procedure. The order then made was an order by the Court of its own motion in reference to a suit then pending on its own file in which it had already issued an injunction restraining the execution proceedings.

I dismiss the appeal with costs.

MAHMOOD, J.—I am entirely of the same opinion. My brother Straight has already stated that the rule laid down in the Full Bench case of *Radha Charan* v. *Man Singh* (2) approving an earlier ruling of this very Bench is not to be shaken in its authority or in its application. My brother has also said that, so far as the order of the 28th July 1886, striking off the application for execution dated the 28th May 1886, made by the Subordinate Judge of Aligarh, is concerned, the ruling of *Fakirullah* v. *Thakur Prasad* (1) does not govern this case. That proceeding is therefore of no value to either party for the purposes of barring any application for execution of the decree.

And moreover the important point upon which I entirely concur with my brother Straight is the principle of not going behind a proceeding in execution which has already been taken to be valid. This rule is contemplated not only by the case of *Ram Kirpal* v. *Rup Kuari* (3) and *Mungul Parshad Dichit* v. *Girja Kant Lahiri* (4), but also by the general principles laid down by their Lordships in the Privy Council in the case of *T. R. Aruna Chellam Chetti* v. *V. R. R. M. A. R. Aruna Chellam Chetti* (5). I have considered it necessary to say this because there are some cases now pending in this Court which have been referred by me to a Bench of two Judges for the decision of this very question, and I may add that the view of the law now taken by my brother Straight and myself is in accord with the suggestion which I made in delivering my judgment in *Badri Nath Misr* v. *Ram Rup Singh* (6).

Appeal dismissed.

(1) I. L. R., 12, All., 179.
(2) I. L. R., 12, All, 392.
(3) I. L. R. 6 All. 269.
(4) I. L. R., 8, Calc., 51.
(5) L. R., 15 I. A., 171.
(6) Weekly Notes, 1890, p. 9.

Before Mr. Justice Mahmood.

1891
June 2.

ILAHI BAKHSH AND ANOTHER (DECREE-HOLDERS) *v.* BAIJ NATH (JUDGMENT-DEBTOR).*

Execution of decree—Default of purchaser at sale in execution—Deficiency in price arising on re-sale—Order against defaulter to make good such deficiency—No appeal from such order—Civil Procedure Code, ss. 2, 293, 540, 588.

No appeal lies from an order under s. 293 of the Code of Civil Procedure directing a defaulting purchaser at a sale in execution of a decree to make good the loss happening on a re-sale occasioned by his default. *Soudagar Mal* v. *Abdul Rahman Khan* (1) and *Tapesri Lal* v. *Deokinandan Rai* (2) followed.

THE facts of this case sufficiently appear from the judgment of Mahmood, J.

Pandit *Moti Lal*, for the appellants.

Mr. D. *Banerji*, for the respondent.

MAHMOOD, J.—Upon the case being called on for hearing Mr. *Dwarka Nath Banerji* for the respondent takes a preliminary objection to the effect that the appeal does not lie, and in order to render the objection and the grounds upon which it proceeds intelligible, it is necessary to state the following facts:—

On the 24th January 1880, one Jogal Kishore obtained a decree for recovery of Rs. 11,583-0-9, against the present appellants, Ilahi Bakhsh and Rahim Bakhsh, by enforcement of lien against certain immovable property belonging to them.

In execution of the abovementioned decree mauza Dharampur was sold by auction on the 20th June 1882, when the present respondent, Baij Nath, made a bid of Rs. 7,500, and deposited one-fourth of the price in Court as required by law. He, however, failed to deposit the three-fourths of the sale-money within the period of fifteen days, and the result was that the auction-sale of the 20th June 1882, stood as annulled.

On the 20th November 1883, the same property was brought to sale by auction for the second time, and upon this occasion two

* First Appeal No. 182 of 1890 from an order of Babu Mata Prasad, Subordinate Judge of Bareilly, dated the 9th June 1890.

(1) Weekly Notes, 1890, p. 85. (2) Weekly Notes, 1890, p. 89.

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persons, Ghulam Ahmad and Ghias-ud-din, purchased it in lieu of Rs. 6,665, that is to say, for a sum which fell short of Baij Nath's bid of the 20th June 1882, by Rs. 835.

Matters stood thus, when on the 19th November 1886, Rahim Bakhsh and Ilahi Bakhsh aforesaid applied to the Court for recovery of Rs. 835 from the defaulting bidder Baij Nath, present respondent. This application purported to have been made under s. 293 of the Code of Civil Procedure, and, upon the application having been made, Baij Nath, respondent, preferred objections, but his objections were disallowed, and on the 8th January 1887, the Subordinate Judge made an order that the sum of Rs. 835 was to be paid to them by Baij Nath.

It appears then that on the same day, namely, the 8th January 1887, Jogal Kishore, the holder of the decree of the 24th July 1880, applied for attachment of the sum of Rs. 835 in the hands of the respondent, Baij Nath. The attachment was actually made on the 14th January 1887, and it seems that subsequent to the attachment the decree-holder, Jogal Kishore, sold the decree to one Raghubar Dyal, who is no party to this litigation.

On the 1st December 1889, the respondent, Baij Nath, paid the sum of Rs. 835 to Raghubar Dyal, the abovementioned purchaser of the decree.

On the 4th January 1890, the abovementioned Ilahi Bakhsh and Rahim Bakhsh applied to the Subordinate Judge to execute his order of the 8th January 1887, with the object of recovering Rs. 835 from Baij Nath, respondent. Baij Nath thereupon objected to the execution upon the ground that he had already paid the sum of Rs. 835 to Raghubar Dyal, and was therefore no longer liable to pay to Ilahi Bakhsh and Rahim Bakhsh. These objections were allowed on the 9th June 1890.

It is from this order that this first appeal has been preferred, and Mr. *Dwarka Nath Banerji* contends that inasmuch as the order must be taken to have been one made under the provisions of s. 293 of the Code of Civil Procedure, and inasmuch as Baij Nath, respon-

dent here, was no party to the original decree of the 24th January 1880, the order which is the subject of appeal is not such an order as can be called a decree either in the regular sense of the terms as understood in the regular suit, or a decree within the explanation of it in s. 2 of the Code of Civil Procedure, and therefore no first appeal could lie under s. 540 of the Code. Mr. *Dwarka Nath Banerji* in support of his contention has relied upon *Soudagar Mal* v. *Abdul Rahman Khan* (1), in which the learned Chief Justice and Mr. Justice Brodhurst concurred in holding that no appeal lies from an order under s. 293 of the Code of Civil Procedure for recovery from a defaulting purchaser of a deficiency of price happening on a re-sale of the property, such order not being a "decree" within the meaning of s. 2 of the Code This view of the law was followed by my brother Tyrrell in *Tapesri Lal* v. *Deoki Nandan Rai* (2).

In view of these two rulings Mr. *Moti Lal* frankly concedes that he cannot support the appeal so far as the preliminary objection is concerned. Following the principle of the rulings cited I hold that no appeal lies, and I dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

1891
June 26.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Knox.

NATHAN AND OTHERS (DEFENDANTS) *v.* KAMLA KUAR AND ANOTHER (PLAINTIFFS)*

Land-holder and tenant—Suit for possession of fallen wood of self-sown trees growing on an occupancy-holding—Burden of proof.

A zamindár claiming a right to the fallen wood of self-sown trees which had been growing on an occupancy-holding must prove some custom or contract by which he is entitled to take such wood. The English law as to ownership under similar circumstances cannot be applied, and (*sed quære*) there is no general rule in India to decide that there is a right in the landlord or a right in the tenant by general custom to the fallen wood of self-sown trees.

* Miscellaneous application No. 128 of 1890, under s 617 of the Civil Procedure Code, with a reference by H. B. Punnett, Esq, District Judge of Saháranpur, dated the 5th August 1890.

(1) Weekly Notes, 1890, p 85. (2) Weekly Notes, 1890, p. 89.

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THIS was a reference from the District Judge of Saháranpur for decision of the following question:—"Does the burden of proving the right to fallen wood in the case of self-grown trees in an occupancy tenant's holding fall on the landlord or on the tenant?" The facts out of which the reference arose are sufficiently stated in the judgment of the Court.

The Hon'ble Mr. *Spankie*, for the appellants.

Pandit *Ajudhia Nath* and Munshi *Ram Prasad*, for the respondents.

EDGE, C. J., and KNOX, J.—This is a reference by the late Officiating Judge of Saháranpur. The plaintiffs were zamíndárs. The defendants were two occupancy tenants of the plaintiffs. The plaintiffs brought this suit alleging a right to the fallen wood of a pipal tree, which, as we gather from the reference, had grown within the occupancy-holding of the defendants. It is stated, and we must take it to be the fact, that the tree was not planted by the zamíndárs or by the tenants, and that it was a self-planted tree. The question which we are asked is, "does the burden of proving the right to fallen wood in the case of self-grown trees in an occupancy tenant's holding fall on the landlord or on the tenant?" We have been referred to several authorities, but none of them appear to us to apply to a case like this. The case of *Deoki Nandan* v. *Dhian Singh* (1) does not apply. That was a case in which the landlord claimed a right to cut down and remove fruit bearing trees which were growing on his tenant's holding. That, apart from special custom or contract, he clearly could not have a right to do. The other cases do not relate to self-grown wood. On behalf of the tenants Mr. *Spankie* has contended that they had the right not only to take the fallen wood of self-grown trees but to prevent such trees growing. We certainly think that a tenant would clearly be entitled to prevent the growth of any trees which were not growing at the time of the commencement of his tenancy, and the growth of which would interfere with the purpose for which the land was let to him, provided that there was no custom or contract

(1) I. L. R., 8 All., 467.

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to the contrary. However, that does not assist us to answer this question. We are not aware of any authority in India which enables us to decide that there is a right in the landlord or a right in the tenant by general custom to the fallen wood of self-grown trees. In our opinion a person who brings his suit, claiming that the fallen timber of self-grown trees within an occupancy-holding belongs to him must prove his right by showing a general custom of the district, a particular custom of the village, or a contract which gives him the right. In this case there was a *wâjib-ul-arz*. The learned Officiating District Judge did not consider that that *wâjib-ul-arz* could be treated as satisfactory evidence. We do not intend to decide whether it can or not, but we merely point out that it was a *wâjib-ul-arz* made as long ago as 1867, and that it should be a question possibly for the consideration of the District Judge what effect should be given to the *wâjib-ul-arz* if he found that it had been acted upon and the correctness of it had not been disputed until quite recently. We ought to say, as our opinion is invited on the point, that the law in England relating to fallen timber could not, in our opinion, be accepted as evidence of custom or representing what the law is in India on this point.

The papers will be returned to the District Judge of Saháranpur with the answer which we have given.

APPELLATE CIVIL.

1891.
July 15.

Before Sir John Edge, Kt., Chief Justice and Mr. Justice Knox.

RADHA KISHEN AND OTHERS (DEFENDANTS) v. RAJ KUAR (PLAINTIFF.)*

Justice and equity and good conscience—Succession to out-casted Brahmin—Brothers of deceased remaining in caste—Sons of deceased by Bania widow.

Khuman, a Brahmin, lived with a Bania widow, for which offence he was outcasted. He left his family and his village and went to live elsewhere, taking the widow with him. He had sons by her, and he and his family lived as cultivators and acquired property. Khuman died in his new home and left the widow and their sons

* Second Appeal No. 84 of 1889, from a decree of W. H. Hudson, Esq., District Judge of Farakhabad, dated the 24th September 1888, reversing a decree of Rai Ishri Prasad, Subordinate Judge of Farakhabad, dated the 22nd August 1888.

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in possession of the property which he had acquired. This being so, the brothers of the deceased Khuman sold the property which had been thus acquired by him to one R. K. R. K. thereupon sued his vendors and the surviving sons of Khuman by the widow, together with their mother and the widow of a deceased son for recovery of the property :—

Held that the sons of Khuman by the Bania widow with whom he had been living and their mother were entitled to remain in possession of the property acquired by Khuman as against the brothers of deceased who had remained in caste.

The facts of this case, are sufficiently stated in the judgment of the Court.

Pandit *Ajudhia Nath*, for the appellants.

The Hon'ble Mr. *Spankie*, for the respondent.

EDGE, C. J., and KNOX, J.—This was a suit to recover possession of certain zamindari property, some houses and bonds and other property from the surviving sons of one Khuman, the mother of those sons and the widow of a deceased son. The other defendants are brothers of Khuman, who sold to the plaintiff. The facts of the case are peculiar. Khuman was a Brahmin, and, having taken a Bania widow to live with him, was outcasted. He left his village, removed to another village, and there lived with the Bania widow. In course of time she bore children to him, the eldest of whom is now thirty-five years old. She and her sons and the widow of one of the sons are the first lot of defendants to whom we have referred. Khuman and his sons, as we infer from the judgment of the lower appellate Court, carried on cultivation together, and Khuman, according to the finding of the lower Court, acquired the property in dispute in this suit. It has been found by the first Court that the plaintiff paid no consideration whatever for the sale to him. That finding is not dissented from in the judgment upon which the decree under appeal was founded. The Judge below gave the plaintiff a decree for possession. Against that decree this appeal has been brought.

We have been referred to texts from Manu, to passages from West and Bühler and to several authorities, and none of them seem to us precisely to govern this case. We have here a case of the illegitimate offspring of parents who belonged to the twice-born classes of Hindus, the father being a Brahmin, the mother a Bania.

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We have also to deal with a case in which the property in dispute, which is in the possession of the offspring of those parents was, according to the finding of the lower appellate Court, which we must accept, the self-acquired property of Khuman, after he had been outcasted, after he had left his family and his village and had started in another village to make a livelihood for himself, the woman who lived with him and their children. If we were trying this case as a Court of first instance, or as a Court of first appeal, we should come to the conclusion that Khuman, having lost his caste, had started a separate family altogether; separate, that is, in the sense of total and absolute separation from the family of his birth and his caste-fellows. We cannot find amongst the authorities and texts cited to us any sure principle to guide us in this case. Under these circumstances we must act on the principles of equity and good conscience, and decline to oust from the possession of the property acquired by Khuman his sons and their mother and the widow of the deceased son for the benefit of the vendee of brothers who were no parties to the acquisition of any portion of this property, and which was not acquired by any ancestor of theirs. This is a very peculiar case and the view we take of it might be absolutely inapplicable in other cases; but, holding the opinion which we do as to what good conscience dictates, in the present case we allow the appeal with costs, and dismiss the suit with costs.

Appeal allowed.

Before Sir John Edge, Kt., Chief Justice, and Mr. Justice Straight.

1891 *July* 20.

JWALA PRASAD (PLAINTIFF) *v.* SALIG RAM (DEFENDANT).*

Jurisdiction—Civil and Revenue Courts—Appeal—Erroneous exercise of Jurisdiction by subordinate Court capable of being made a ground of appeal to the High Court.

Where the High Court is the Court of appeal from any particular subordinate Court, and that Court acts without jurisdiction in the trial of a suit or an appeal before it, the High Court has power as an appellate Court to set right the proceedings of such subordinate Court. *Kishna Ram* v. *Hingu Lal* (1) and *Tota Ram* v. *Ishur Das* (2) overruled.

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* Appeal No. 1 of 1891 under Section 10 of the Letters Patent.

(1) I. L. R., 4, All, 237. (2) Weekly Notes, 1887, p. 70.

1801

JWALA PRASAD v. SALIG RAM.

This was a suit to recover the sum of Rs. 81-3-0 as arrears of rent, brought by the plaintiff-respondent, against the defendant-appellant in the Court of the Deputy Collector of Etáwah. No question of the rate of rent due was in issue. The Deputy Collector found that the defendant was the plaintiff's tenant and decreed his claim in full. The defendant then appealed to the District Judge, who entertained the appeal, and, reversing the decree of the Court of first instance, dismissed the plaintiff's suit. The plaintiff then appealed to the High Court. The case came before Young, J., who reversed the decree of the District Judge and restored that of the first Court. From this decree the defendant appealed under s. 10 of the Letters Patent.

Mr. *J. Simeon*, for the appellant.

Munshi *Madho Prasad*, for the respondent.

STRAIGHT, J.—This appeal relates to a suit for rent brought in the Court of the Deputy Collector of Etáwah for a sum below the value of one hundred rupees. The first Court decreed the plaintiff's claim, on which the defendant preferred an appeal to the Court of the District Judge, who reversed the decision of the first Court and dismissed the plaintiff's suit. From that decree a second appeal was preferred to this Court, and, relating to a sum of less than one hundred rupees, it came before Mr. Justice Young. A preliminary objection was taken to the hearing of the appeal on the ground that as no appeal lay to the District Judge, *á fortiori* no appeal lay to this Court. That proposition had authority in cases to be found in I. L. R., 4, All., 237 and Weekly Notes 1887 p. 76, to both of which I was a party, and there are other rulings of mine to a like effect. I have for some time past, after consultation with the rest of the Court, come to the conclusion that those rulings were erroneous, and that when this Court is the Court of appeal from a particular subordinate tribunal, and that subordinate tribunal acts without jurisdiction in the trial of a suit or an appeal, this Court has power in the form of an appeal to set right the proceedings of such subordinate tribunal.

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JWAIA PRASAD v. SALIG RAM.

This was the view Mr. Justice Young took of the preliminary objection in the present case, and, rejecting it, he allowed the appeal, reversed the judgment, and restored the decree of the first Court. The only point taken here is that Mr Justice Young was wrong on the question of jurisdiction. I think he was right and dismiss the appeal with costs.

EDGE, C. J.—I agree.

Appeal dismissed.

REVISIONAL CRIMINAL.

1891
July 27.

Before Mr. Justice Straight.

QUEEN-EMPRESS *v* BISHAMBAR LAL.

Criminal Procedure Code, ss 133, 136, 140—*Act XLV of* 1860, *s.* 188—*Disobedience to order duly promulgated by public servant.*

A person against whom an order under s. 133 of the Code of Criminal Procedure is passed, who neglects to take any steps whatever in respect of such order within the time therein specified, either by way of compliance therewith or by way of objection thereto in the manner prescribed by law, renders himself liable to be proceeded against under s 188 of the Indian Penal Code without its being necessary to wait until the order has been made absolute. If such order is made absolute under s 140 of the Code of Criminal Procedure, further proceedings can then be had, under s 188 of the Indian Penal Code, against the person disobeying the order absolute. When an order under s 133 of the Code of Criminal Procedure has been made absolute under s. 140 *ib.* its validity cannot subsequently be questioned. *Queen-Empress* v. *Narayana* (1). appproved.

THE facts of this case sufficiently appear from the judgment of Straight, J.

Mr. *Ross-Alston*, for the applicant.

The Government Pleader (Munshi *Ram Prasad*), for the Crown.

STRAIGHT, J —The District Magistrate of Mirzapur made an order under s. 133 of the Criminal Procedure Code requiring the applicant, Bishambar Lal, to remove from a public thoroughfare certain stones that he had placed thereon in such a way as to cause an obstruction within a period named in such order, or to appear and show cause against the order, or apply for a jury to try whether the same was reasonable and proper. The petitioner did neither one

(1) I. L. R., 12 Mad., 475.

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QUEEN-EMPRESS v. BISHAMBAR LAL.

thing nor the other. He neither obeyed the order for removing the stones, nor did he appear on the date fixed to show cause against the order, nor did he apply for a jury to try whether the same was reasonable and proper. In other words, he wholly disregarded and flouted the Magistrate's order, and it is not surprising therefore that, upon this being brought to the Magistrate's knowledge, proceedings were instituted against him under s. 188 of the Indian Penal Code for disobedience to an order lawfully promulgated by a public servant having authority to make such order. The case was tried before the Joint Magistrate of Mirzapur, who convicted the petitioner and fined him in the very moderate amount of 5 rupees. He now comes to this Court in revision and assails that order upon two grounds, first, that the Magistrate who tried the case had no jurisdiction under the provisions of s. 487 of the Criminal Procedure Code, and, secondly, that the District Magistrate's order not having been made absolute, there could be no offence under s. 188, Indian Penal Code.

As to the first of these objections it proceeds upon a misconception of the facts. The learned counsel was instructed that Mr. Holms, the Joint Magistrate who tried the charge under s. 188, was the Magistrate who issued the order under s. 133, but this turns out not to be so. Mr. Crooke, the Magistrate of the District, was the person who issued such last mentioned order.

Then I come to the second contention, and Mr. *Alston* vigorously urges that if effect is given to the views of the two Courts below the result is that a man can be punished twice over for the same offence. That does not appear to me to be quite an accurate representation of the matter. It seems to me upon the proper reading and construction of s. 136 with those sections that precede it, that where an order has been issued under s. 133, Criminal Procedure Code, and the person on whom it has been served does not perform the act he is directed to do, or do what is open to him, namely, appear on the date fixed and show cause against the order or apply for the appointment of a jury, he is treating that order of the authority entitled to make it with contempt, and that for that con-

tempt, he, neither obeying it, nor seeking by finding fault before the proper tribunal to set right that order nor asking for a jury to say whether it is right and reasonable, has rendered himself liable to punishment. It should be noted that the words of the section are that "if such person does not perform such act or appear and show cause or apply for the appointment of a jury as required by s. 135, he shall be liable to the penalty prescribed in that behalf in s. 188 of the Indian Penal Code, and the order shall be made absolute."

There is a clear and distinct provision as to the conditions precedent to the penalty that the section imposes, and the words with which the section closes follow after, *viz.*, "and the order shall be made absolute." Now it seems to me that in this case the order might have been made absolute under s. 140, and that after the notice contemplated by that section and the refusal still by the petitioner to obey that order, that would again be punishable, and that the person making it would have the power to enforce all the remedies provided in s. 140. In my opinion when once an order has been made absolute under s. 136, it is incompetent for the party against whom that order has been made to go behind it and question its validity in any way. In this view there is the case reported in I. L. R., 12 Mad., 475 (*Queen-Empress* v. *Narayana*) with the reasoning of which I entirely concur. The effect of my view, therefore is, that if, as I have said, a person to whom an order under s. 133 is issued flouts that order in the manner contemplated by s. 136, Criminal Procedure Code, not only does he render himself liable to the provisions of s. 188, Indian Penal Code, then and there, but without any further inquiry or proceeding that order must be made absolute, and behind that order he cannot at any future time go. In this aspect of the case I think that this application for revision fails and I dismiss it.

Appeal dismissed.

1891
July 28.

APPELLATE CIVIL.

Before Mr. Justice Straight and Mr. Justice Knox.

RAM KISHEN UPADHIA (PLAINTIFF) *v.* DIPA UPADHIA (DEFENDANT.)*

Second appeal—Plea raised at the hearing which was not taken in the memorandum of appeal—Practice.

A plea that the memorandum of appeal in the lower appellate Court was insufficiently stamped, and that such deficiency was not made good within the period of limitation is not a plea which can be raised at the hearing of a second appeal, when it has not been taken in the memorandum of appeal.

The plaintiff-appellant claimed a declaration of right and maintenance of possession in respect of a certain zamindari share by cancelment of certain Settlement Court's decisions. He obtained a decree in the Court of first instance. The defendants appealed; and the Court of appeal (the Subordinate Judge), finding that the plaintiff-respondent had been out of possession for more than twelve years before suit, decreed the appeal and dismissed the plaintiff's claim. The plaintiff then appealed to the High Court, and there a plea was sought to be raised in his behalf which had not been taken in the memorandum of appeal, namely, that the defendant's memorandum of appeal in the lower appellate Court had not been properly stamped, and that the deficiency in stamp had not been made good within the period of limitation.

Mr. *J. Simeon*, for the appellant.

The Hon'ble Mr. *Spankie*, for the respondents.

STRAIGHT, J. (KNOX, J. concurring). I have had an opportunity of consulting the learned Chief Justice upon the question raised by the learned pleader for the appellant which was not taken in his memorandum of appeal, *viz.*, that by reason of the fact that the memorandum of appeal presented to the appellate Court was insufficiently stamped on the date upon which it was presented, there was no appeal at that time before the Court, and the subsequent payment of the deficiency did not cure the defect and save the bar of

* Second Appeal No 424 of 1889 from a decree of Rai Lalta Prasad, Subordinate Judge of Ghazipur, dated the 11th January 1889, reversing a decree of Maulvi Muhammad Abdul Ghafur, Munsif of Ballia, dated 10th November 1887.

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limitation. My brother Knox and I, in common with the learned Chief Justice, are agreed that where a question of this kind is not specifically taken in the memorandum of appeal, involving as it does primarily a matter of Court-fees and the other incidental inquiries that necessarily arise in regard thereto, it should not be entertained. That being so, we have to consider whether there is any ground for this appeal. The learned pleader has not seriously contended that the finding of the learned Judge that the plaintiff-appellant was never in possession of the property to which he seeks a declaration of his title, is not strongly in favor of the view that the plaintiff had no title in respect of which he could claim to have a declaration. The appeal is dismissed with costs.

Appeal dismissed.

Before Sir John Edge, Kt., Chief Justice, Mr. Justice Straight and Mr. Justice Mahmood.

1891
July 30.

TULSA (PLAINTIFF) *v.* KHUB CHAND (DEFENDANT) *

Mortgage—Prior and subsequent mortgages—Rights of persons advancing money to pay off a prior mortgage—Suit to sell mortgaged property under mortgage—Form of decree to be given.

Where in a suit to bring certain immovable property to sale under a mortgage it was found that the predecessor in interest of one of the defendants had advanced money upon a mortgage of the same immovable property in order to save a portion thereof from sale under two prior mortgages: *held* that such defendant was entitled to the benefit of the payment so made, and that the proper decree in the suit should be that the plaintiff could only bring that portion of the property in suit to sale on payment to the said defendant of the money advanced as aforesaid, with interest from the date of payment to the date of the receipt of the final decree by the Court of first instance together with proportionate costs; such payment to be made within 90 days from the ascertainment of such amount and the receipt of the final decree by the Court of first instance; otherwise the plaintiff to be absolutely debarred from all right to redeem that particular portion of the property mortgaged.

The facts of this case are fully given in the judgment of the Court.

Pandit *Sundar Lal* and Babu *Durga Charan Banerji*, for the appellant.

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* Second Appeal No. 1141 of 1888 from a decree of H. F. Evans, Esq., District Judge of Aligarh, dated 23rd April 1888, reversing a decree of Babu Abinash Chandar Banerji, Subordinate Judge of Aligarh, dated 6th October 1885.

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TULSA v. KHUB CHAND.

Babu *Jogindro Nath Chaudhri*, for the respondent.

EDGE, C. J., and STRAIGHT, J.—The suit out of which this second appeal has arisen was brought on the 8th of February 1882, by Khub Chand against Musammat Tulsa and Bhupal upon an hypothecation bond which had been executed by Bhupal in favour of Khub Chand on the 15th of June 1872, and by which Bhupal had hypothecated, amongst other things, his ancestral zamindári share of 1 biswa, 6 biswansis, 16¾ kachwansis in mauza Salempur, Pironda. The plaintiff by his suit sought to bring the mortgaged property to sale.

We are not concerned with the case of Bhupal. He is not a party to this appeal. Musammat Tulsa defended the suit as to 15 biswansis of the 1 biswa, 6 biswansis, 16¾ kachwansis zamindári share on the ground that she had a prior lien. The circumstances upon which her claim of lien depends are as follows :—

By two bonds, dated respectively the 22nd of December 1865, Bhupal had hypothecated the 15 biswansis in question to Desraj. Desraj died, and after his death his widow and his son, Khub Chand, obtained on those bonds decrees for sale of the 15 biswansis share. The sale was fixed for the 20th of July 1877. In order to satisfy the amounts of those decrees and thus save the 15 biswansis from sale, and for other purposes, Bhupal, on the 10th of July 1877, borrowed Rs. 1,200 from Baldeo Das, and, in consideration of the moneys advanced, executed on that date a bond in favor of Baldeo Das hypothecating his proprietary rights in the zamindari share of 1 biswa, 12 biswansis, which included the 15 biswansis in question. It was expressly stated in the bond of the 10th of July 1877 that the Rs. 1,200 was borrowed partly to satisfy those two decrees. On the 12th of July 1877, Bhupal, out of that Rs. 1,200 paid into Court, in the one suit, Rs. 204-4-6, and in the other, Rs. 295-11-6, in all Rs. 500, and thus satisfied the two decrees and saved the 15 biswansis share from sale. Baldeo Das died before the commencement of the suit. His widow, Musammat Tulsa, has vested in her such rights and interests as Baldeo Das acquired by the mortgage of the 10th of July 1877.

On the above facts the Subordinate Judge dismissed the plaintiff's claim to have the 15 biswansis share brought to sale. On appeal the District Judge set aside that portion of the decree of the Subordinate Judge which exempted the 15 biswansis share from sale and decreed their sale, but provided that a sale of the 15 biswansis share should only be resorted to in the event of the proceeds of a sale of the balance of the 1 biswa, 6 biswansis, 16¾ kachwansis, that is, 11 biswansis, 16¾ kachwansis, being found insufficient to discharge the amount due to the plaintiff under the mortgage of the 15th of June 1872. The defendant, Musammat Tulsa, has appealed.

Mr. *Durga Charan Banerji* for the appellant and Mr. *Jogindro Nath Chaudhri* for the respondent respectively cited many authorities, all of which, with one exception, have been considered, since this appeal was argued, in the Full Bench case of *Matadin* v. *Kazim Husain* (1). The exception was an unreported decision of this Court of the 27th of March 1888, in the case of *Musammat Deva Kuar* v. *Bhojraj* and *Debi Sahai*.

Mr. *Jogindro Nath Chaudhri* contended that the reported cases relied upon by Mr. *Durga Charan Banerji* were not in point, as they were either cases in which a mortgagee had subsequently to his mortgage acquired the equity of redemption, or cases in which a purchaser of the equity of redemption had redeemed a mortgage. As to the unreported case he admitted that it was in point but contended that it was not supported by authority. He pointed out that it was Bhupal and not Baldeo Das who on the 12th of July 1877 paid the Rs. 500 into Court in satisfaction of the two decrees, and contended that if it was the intention of Bhupal and Baldeo Das that the prior liens should be kept alive as shields for Baldeo Das, Baldeo Das would have obtained an assignment of the two decrees. The District Judge had in his judgment referred to the case of *Mohesh Lal* v. *Mohant Bawan Das* (2), and applied it by drawing the inferences which their Lordships of the Privy Council drew on the facts of that case, pointing out, however, that there

(1) I. L. R., 13 All, 432. (2) L. R. 10 I. A. 62; s. c. I.L R. 9 Calc. 961.

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was in that case no intermediate incumbrance. In our opinion that fact made the case of *Mohesh Lal* v. *Mohant Bawan Das* inapplicable to this case. In that case their Lordships of the Privy Council, after referring to the rule enunciated by the Master of the Rolls in *Adams* v. *Angell* (1), are reported (at page 71 of the Report) to have said :—"applying that rule to the present case, it must be presumed, in the absence of any expression of intention to the contrary, that Mangal, who, when he borrowed the money to pay off Lachmi Narain's mortgage, claimed to be the owner of the estate and was stated on the face of the bond to be so, intended that the money should be applied in paying off that mortgage, and in extinguishing the charge, there being no intermediate incumbrance."

It is obvious to us that if there had been in that case an intermediate incumbrance their Lordships would not have held that there must have been any such presumption, and that they would have held that there must, unless the contrary appeared, have been the opposite presumption. The judgment of their Lordships of the Privy Council in *Gokul Doss Gopal Doss* v. *Ram Bux Seochand* (2), appears to place that question beyond doubt.

In this case it was clearly to the interests of Bhupal and Baldeo Das that the liens created by the mortgages of 1865 and 1869 and and the decrees upon those mortgages should not be destroyed but should continue for their respective benefits as shields against the mortgage of 1872. There is nothing to show that in satisfying those decrees Bhupal or Baldeo Das intended to destroy those liens. Indeed the contrary may be inferred from the statement in the bond of the 10th of July 1877, to which we have referred.

The observations of their Lordships on *Toulmin* v. *Steere* (3) reported at page 133 of L. R. 11 I. A., show that no inference is to be drawn from the fact that there was no formal transfer of the decrees of 1877 and no intention to keep the liens alive ever formally expressed. In *Gokul Doss Gopal Doss* v. *Ram Bux Seochand* (4), their Lordships of the Privy Council are reported (at p. 134) to have

(1) L. R. 5 Ch. D. 634.
(2) L. R. 11 I. A. 126. s. c. I. L. R. 10 Calc. 1035.
(3) 3 Mer., 210.
(4) L. R., 11 I. A., 126.

said :—"The ordinary rule is that a man having a right to act in either of two ways shall be assumed to have acted according to his interests. In the familiar instance of a tenant for life paying off a charge upon the inheritance, he is assumed, in the absence of evidence to the contrary, to have intended to keep the charge alive. It cannot signify whether the division of interests in the property is by way of life estate and remainder or by way of successive charges. In each case it may be for the advantage of the owner of a partial interest to keep on foot a charge upon the *corpus* which he has paid."

Such protection as justice, equity and good conscience, according to the passage just quoted from the judgment of their Lordships of the Privy Council, as applied to the facts of this case, affords to Bhupal or afforded to Baldeo Das, Musammat Tulsa, as the representative of Baldeo Das the mortgagee of 1877, is entitled to.

The plaintiff, so far as the 15 biswansis are concerned, did not admit Musammat Tulsa's right of lien; what he asked was that the 15 biswansis should be sold. He has not made out a case for the relief which he asked. We, however, have come to the conclusion that the plaintiff should have a decree entitling him to bring the 15 biswansis share to sale upon payment to Musammat Tulsa of the Rs. 500 and interest at the rate of 6 *per centum per annum* thereon with proportionate costs in all Courts. Applying the analogy of the Transfer of Property Act, we allow the plaintiff 90 days from the date when the amount of the principal sum of Rs. 500 and the interest thereon calculated at the rate of 6 rupees *per centum per annum* from the 10th of July 1877 to the date of our decree has been ascertained and our final decree has been received in the Court of first instance for payment of such principal and interest with the proportionate costs of this suit in all Courts. If the payment be not made within such 90 days, this suit will stand dismissed with costs, so far as the claim to bring to sale the 15 biswansis is concerned, and the plaintiff will be absolutely debarred of all rights to redeem the 15 biswansis in question. To that extent we vary and modify the decree below. As the plaintiff did not seek the proper

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relief and absolutely denied Musammat Tulsa's right of lien, we do not allow him any costs as against Musammat Tulsa.

MAHMOOD, J.—I agree entirely with the first portion of the judgment delivered by the learned Chief Justice, namely, the portion which ends where the decree in the case begins. I also agree with him as to the latter portion of the judgment so far as it deals with the decree to be made in this case, because I understand that the learned Chief Justice and my brother Straight are of opinion that the judgment of the majority of the Full Bench of this Court in Second Appeal No. 1210 of 1888 requires such a decree. I am bound by the majority of this Court, and I therefore agree also in the decretal order.

Decree Modified.

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ACTIONABLE CLAIM. *See* Acts—1882—IV, s. 135.

ACTS—1858—XL, s. 7. *Minor—Guardian*] The grant of a certificate under s 7 of the Bengal Minors Act (XL of 1858) should not be based exclusively on considerations of propinquity of relationship without regard to the other circumstances of the case affecting the interests of the minor and the fitness of the person appointed.

Solma *v.* Khalak Singh 78

——1859—IX, s. 20. *Forfeiture of rebel's property—Limitation*] A Hindu widow in possession of a six annas zamíndári share of her husband sold the share in 1855 to persons who, in 1858, were convicted of rebellion, and their estates, including the share, were confiscated by Government. The share was granted to other persons as a reward for loyalty, and remained in their possession until 1886, when a suit for possession and mesne profits was brought, just before the expiry of twelve years from the widow's death, by a reversioner to her husband's estate, on the ground that the sale of 1855 could not affect more than the widow's life interest, and that nothing more had been confiscated by the Government in 1858 and granted to the defendants The plaintiff had taken no steps in 1855 to question the sale, or in 1858 to assert his claims as reversioner.

Held that the suit was barred by s 20 of Act IX of 1859. *Ram Dhun* v *Rajah Bhawanee Singh, Bhugwan Das* v. *Banee Dalal*, and *Mahomed Bahadur Khan* v. *The Collector of Bareilly* referred to.

Ramphul Tiwari *v.* Badri Nath 103

——1860—XLV (Indian Penal Code), s. 188. *See* Criminal Procedure Code, ss 133, 136, 140.

——, s. 182. *Definition of offence provided for in s.* 182 *explained*] In order to constitute the offence defined in s 182 of the Indian Penal Code it is not necessary that the public servant to whom false information is given should be induced to do anything or to omit to do anything in consequence of such information. The gist of the offence is not what action may or may not be taken by the public servant to whom false information is given; but the intention or knowledge (to be inferred from his conduct) of the person supplying such information. *Golam Ahmed Kazi*, dissented from.

Queen-Empress *v.* Budh Sen 351

——1868—I (General Clauses Act), s. 2, cls. (5) and (6). *See* Mortgage.

——1870—VII, s. 7, cl. IX. *See* Court-fee.

——1873—X, ss. 10 and 11. *Referee's depositions inadequate for decision of question referred—Appeal after death of referee—Practice.*] Where a cause had been decided under the provisions of ss. 10 and

Page.

11 of the Oaths Act (Act X of 1873) with reference to the depositions of a person appointed by agreement of the parties as referee, and where, after the death of the referee, on an appeal being preferred against the decree so based upon those depositions, it was found that the said depositions did not fully cover the questions in issue between the parties:

Held, that the case should be remanded to the lower Court for disposal according to the usual procedure.

Mahabir Prasad Misr *v.* Mahadeo Dat Misr 383

ACTS—1873—XII, s. 113. *Civil Procedure Code s.* 13——*Res judicata. Question of title arising on an application for partition, how to be determined—Suit for declaration of right to partition.*] Where a decree declaring a right to partition has not been given effect to by the parties proceeding to partition in accordance with it, and the decree has become, by lapse of time or otherwise, unenforcible, it is competent to the parties, or any of them, if they still continue to be interested in the joint property, to bring a fresh suit for a declaration of their right for partition. Such a suit will not be barred by reason of the former decree for partition, through that decree may operate as *res judicata* in respect of any claim or defence which was, or might have been raised in the suit in which it was passed.

If a Revenue Court in disposing of an application for partition determines a question of title, it must, in so doing, act in conformity with the provisions of s. 113 of Act XIX of 1873. If it disposes of the application otherwise than in the manner contemplated by s. 113, its proceedings are *ultra vires* and will not debar the parties from suing in a Civil Court for a declaration of their right to partition.

Nasrat-ullah *v* Mujib-ullah 309

———XIX, ss. 166, 168 AND 188. *Act XII of* 1881, s. 177—*Interpretation of Statutes—Meaning of the terms "Patti" and "Patti of a mahál"—Pre-emption.*] The expression "patti of a mahál" as used in s. 188 of the North-Western Provinces Land-Revenue Act (Act XIX of 1873) means a division of a mahál distinct from the share of an individual co-sharer.

The right of pre-emption, therefore, which is given by the above named section is not exercisable on the sale merely of the share of an individual co-sharer not amounting to such a division of a mahál.

Moreover the provisions of s. 188 of Act XIX of 1873 do not apply to a sale under s. 168 of the same Act of land other than that in respect of which the arrears which it is sold to satisfy accrued.

Hence where the share of a co-sharer in an imperfect pattidari village, not being the land in respect of which the arrears of rent, for the satisfaction of which the said share is sold, are due, is sold under the provisions of s 177 of the North-Western Provinces Rent Act (Act XII of 1881), no right of pre emption can be claimed in respect of such sale.

So held by Edge, C. J. and Young, J.

Mahmood, J. *contra*. There being no statutory definition of the word "patti" that word must be taken in its ordinary acceptation, and in that acceptation it means the share of a pattidar, whether such share amounts to a definite division of a mahál or not. The exigencies of the law of pre-emption require that in s 188 of Act XIX of 1873, the word "patti" should be construed in its broader signification as equivalent to any share of a pattidar.

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The words of s. 168 which provide that land sold under that section is to be proceeded against "as if it were the land on account of which the revenue is due under the provisions of this Act" render the incidents of sales under s. 166, including pre-emption, applicable to sales under s. 168, with the exception that in such case only the defaulter's interest in the land sold passes by the sale.

Hence a right of pre-emption would accrue under s 188 in respect of the compulsory sale of any share of a co sharer though such share did not amount to a "patti' in the sense of a definite division of a mahál.

Baij Nath *v.* Sital Singh 224

ACTS—1873—XIX, s 241. *See* Acts—1881—XII ss 10, 95 *(a)*.

———1877—1 s. 9. *Possession—Ejectment—Suit in ejectment on a possessory title.*] *Per* EDGE, C J., STRAIGHT and TYRRELL, J J, (MAHMOOD, J, *dissentiente.*) Section 9 of the Specific Relief Act is intended to provide a special summary remedy for a person who, being, whatever his title, in possession of immovable property, is ousted therefrom.

That section does not debar a person who has been ousted by a trespasser from the possession of immovable property to which he has merely a possessory title from bringing a suit in ejectment on his possessory title after the lapse of six months from the date of his dispossession. *Davison* v *Gent*, *Asher* v. *Whitlock*, *Wise* v. *Ameer-un-nissa Khatoon*, *Pemráj Bhavanirám* v *Narayan Shivarám Khisti*, *Krishnarav Yashvant* v. *Vasudev Apaji Ghotikar* and *Muhammad Yusuf* v. *Sukh Nath* referred to.

Per MAHMOOD, J.

A person who is suing upon a merely possessory title to recover possession of immovable property against a person who has ousted him, must bring his suit, if at all, under s 9 of Act I of 1877, and therefore within six months from the date of his dispossession.

Wali Ahmad Khán *v* Ajudhia Kandu 537

———————, s. 42. *See* Acts—1881—XII ss. 10, 95 *(a)*.

———————III, ss 3, 17, 47, 49. *Execution of decree—Act XV of 1877 (Limitation Act), sch. ii, art 179 (4)—Application by transferee of decree for sale of hypothecated property—Non-registration of deed of assignment—Civil Procedure Code, s. 232—Effect of subsequent registration.*] On the 13th November 1886, the assignee of a decree for sale of hypothecated property applied, under s 232 of the Civil Procedure Code, for execution of the decree, but, objection being raised that the deed of assignment had not been registered, subsequently applied for the return of the deed that it might be registered, and it was returned accordingly. The deed was afterwards duly registered. The next application for execution of the decree was made on the 25th April 1888.

Held (i) that the deed of assignment was not a document which comprised immovable property within the meaning of s. 49 of the Registration Act (III of 1877), a decree for sale not being immovable property as defined in s. 3;

(ii) that consequently, although the assignee might not, under the latter portion of s. 19, use the deed for the purpose of proving his title,

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there was no provision in the Act saying that he should not take title under the deed;

(iii) that the position of the assignee when he made his application on the 13th November 1886 was that he was unable to prove that there was a title by assignment in himself;

(iv) that the subsequent registration cured the absence of registration on the 13th November 1886, and under s. 47 of the Registration Act, the document thereupon had full effect, and related back to its execution;

(v) that the application of the 13th November 1886 was a step in aid of execution of the decree within the meaning of art. 179 (4) of sch ii of the Limitation Act (XV of 1877), and that the application of the 25th April 1888 was within time.

Abdul Majid *v.* Muhammad Faizullah 89

ACTS—1877—III, s. 50.—*Registered and un-registered documents—Priority—Mortgagee under registered deed competing with auction-purchaser to a sale under a decree on a prior un-registered mortgage-deed*] Under s. 50 of the Registration Act the decree or order which is not to be effected by a registered document must be a decree or order made prior to the execution and registration of the registered document. Therefore where the plaintiffs, who were mortgagees under a registered instrument, sued to set aside a sale to the defendants under a decree on an unregistered mortgage, the plaintiffs' registered mortgage being subsequent to the unregistered mortgage on which the defendants relied, but prior to the decree thereon—*held* that the defendants, auction-purchasers, must take subject to the rights of the plaintiffs as mortgagees. *The Himalaya Bank Limited* v. *The Simla Bank Limited*; *Madar Saheb* v. *Subbarayalu Nayudu*; *Kanhaiya Lal* v. *Bansidhar*; and *Shahi Ram* v. *Shib Lal* referred to.

Jagrup Rai *v.* Radhey Singh 288

———————XV, s. 15. *See* Civil Procedure Code, s. 268 (*a*).

———————, s. 23, sch. ii, Nos. 34, 35, and 120. *See* Hindu law.

———————, sch. ii, Nos. 113 and 116. *Limitation—Suit by mortgagor to recover money due on a registered mortgage deed.*—A suit by a mortgagor to recover money due on a registered mortgage-deed, together with damages for non-payment, is not a suit to which the period of limitation prescribed by the Limitation Act (Act XV of 1877), sch. ii, No. 113 (for specific performance of a contract) is applicable. The period of limitation applicable to such a suit is that prescribed by No. 116 of sch. ii. of the said Act (for compensation for the breach of a contract in writing registered); and the time from which limitation will run against the mortgagor is, in the absence of any specific provision to the contrary, the date of the execution of the mortgage-deed. *Gauri Shankar* v. *Surju*; *Husain Ali Khan* v. *Hafiz Ali Khan*; *Nobocoomar Mookhopadhaya* v. *Siru Mullick*; *Vythilinga Pillai* v. *Thetchanamurti Pillai*, and *Ganesh Krishn* v. *Madhavrav Ravji*, referred to]

Naubat Singh *v.* Indar Singh 200

———————, No. 120. *Suit by purchaser of decree to recover money of deceased judgment-debtor in the hands of his agent—Limitation*] One A P, having certain moneys lying at his credit in Calcutta, empowered A L to receive the same and hold them on his behalf. A

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P died at Moradabad, and subsequently to his death the said moneys, which remained in the hands of A L, were attached by one of the creditors of A P in execution of a decree. The decree-holder sold his rights under the decree in respect of the moneys in the hands of A L to the plaintiffs, who sued to obtain the same from A L.

Held that the period of limitation applicable to such a suit was that prescribed by art. 120 of the second schedule of the Indian Limitation Act (Act XV of 1877).

Gurudas Pyne v. *Ram Narain Sahu* (I. L. R., 10 Calc. 860), referred to.

Chand Mal *v.* Angan Lal 368

ACTS—1877—XV, SCH. II, No. 127. *Limitation—Suit by Muhammadans for possession by right of inheritance of shares in the property of their deceased ancestor*] The words "joint family property" in No. 127 of sch. ii of the Limitation Act (XV of 1877) mean "the property of a joint family."

Hence the period of limitation prescribed by No. 127 of sch ii of the Limitation Act will not apply to a case in which members of a Muhammadan family are suing for possession by right of inheritance of shares in immovable property alleged to have been that of the deceased common ancestor of themselves and some of the defendants, and of which they alleged they had been dispossessed by the defendants.

Bavasha v. *Masumsha* dissented from.

Ammo Raham *v* Zia Ahmad 282

——————————179 (2). *Execution of decree—"Appeal"—"Final decree or order"—Decree against defendants severally—Appeal by some only of the judgment-debtors—Civil Procedure Code, s. 544*] Where a decree for possession of immoveable property was passed not jointly, but severally, as against all the defendants individually, and specifically stated the proportions of which they were severally in possession, as also the costs separately payable by each of them to the plaintiff; and where two only of the defendants appealed on pleas which did not assail the decree in respect of any right or ground common to the appellants and all or any of the non appealing defendants, but referred merely to the specific property alleged to be in the appellants' hands:—

Held by the Full Bench (Brodhurst and Mahmood, JJ., dissenting) that a first application for execution of the original decree against those defendants who had not appealed from it, and which was made five years after the date of the decree, was barred by limitation, and clause 2 of art. 179, sch. ii of the Limitation Act (XV of 1877), did not apply so as to make time run from the proceedings in the appeal preferred by the other defendants. That clause applies only to those cases in which the parties to the execution proceedings were parties to the appeal, or to the class of cases to which s. 544 of the Civil Procedure Code applies. *J P Wise* v. *Raynarain Chuckerbutty* and *Mullick Ahmad Zumma* v. *Muhammad Syad* approved.

Held by Brodhurst and Mahmood, JJ., *contra*, that art 179, clause 2 must be construed as applying without any exceptions to decrees from which an appeal has been lodged by any of the parties to the litigation in the original suit. *Nur-ul Hasan* v. *Muhammad Hasan* followed.

Mashiat-un-nissa *v.* Rani 1

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ACTS—1877—XV, SCH. II, No. 179, CL. (4). *Execution of decree—Step in aid of execution—Application by decree-holder for leave to bid at sale*—The making of an application by the decree-holder for leave to bid at the sale in execution of his decree is "a step in aid of execution" within the meaning of cl. (4), No. 179, sch. ii of the Limitation Act (Act XV of 1877).

Bansi *v.* Sikree Mal 211

———————————, No. 179 (4). "*Step in aid of execution.*" *See* Execution of decree *and* Act III of 1877 (Registration Act), ss. 3, 17, 47, 49.

———————————, No. 179 (4). "*Step in aid of execution.*"—*Civil Procedure Code, s. 206—Application to bring decree into conformity with judgment.*] The granting of an application under s. 206 of the Civil Procedure Code to bring a decree into conformity with the judgment does not form the starting point of a fresh period of limitation in favour of the decree-holder; nor is such an application a "step in aid of execution" within the meaning of art. 179, schedule ii, of the Limitation Act (XV of 1877).

Kishen Sahai v. *The Collector of Allahabad*, distinguished.

Kallu Rai *v.* Fahiman 124

———1879—I, ss. 3 (10), 9, 33, 34, 57. *See* Stamp.

———————XVIII, s. 13.] A pleader's professional misconduct having amounted to "reasonable cause," within the meaning of s. 13 of the Legal Practitioners Act, XVIII of 1879, for suspending him from practice, their Lordships declined to interfere with the decision of the High Court as to the punishment, it not being clearly shown that the quantum awarded was unreasonable and excessive.

In the matter of F. W. Quarry 93

———1881—XII, ss. 9, 31. *Ex-proprietary tenant—Relinquishment of ex-proprietary rights.*] Though an ex-proprietary tenant cannot transfer his rights as such for a consideration, there is nothing to prevent his voluntarily relinquishing those rights.

Gaya Singh *v.* Udit Singh 396

———————————, ss. 10, 95*(a)*. *Jurisdiction—Civil and Revenue Courts—Suit for declaration that tenants are shikmis and not occupancy tenants, and that their holdings are plaintiffs' sir land—Act XIX of 1873 (N.-W. P. Land Revenue Act), s. 241—Act I of 1877 (Specific Relief Act), s 42.*] The effect of s. 95*(a)* and s. 10 of the North-Western Provinces Rent Act (XII of 1881) is to deprive the Civil Courts of jurisdiction to take cognizance of any suit the object of which is to declare, as between the zamindár and tenants, the status of the tenants.

A Civil Court has no jurisdiction to entertain a suit in which, the defendants being admittedly the tenants of the plaintiffs, the plaintiffs pray for a declaration that certain entries of the defendants in the revenue records as occupancy tenants, and certain orders of the Revenue Courts maintaining those entries, be set aside, and that the defendants are shikmis and not occupancy tenants, and that the land in question is the plaintiffs' sír land. Such a suit cannot be brought within the Civil Court's jurisdiction by dropping all the reliefs claimed except the last-mentioned declaration, that being merely of importance as incidental

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to the previous ones, and as a roundabout mode of obtaining a declaration that the defendants are not the plaintiffs' occupancy tenants.

Per Edge, C.J., and Mahmood, J. Whether the last-mentioned prayer is one which could be brought under s. 42 of the Specific Relief Act, *quære*.

Per Straight, J —The suit might also be considered as one to set aside orders passed by the Settlement Officer in the discharge of his duty for the purpose of correcting the jamabandi as a part of the record of rights, and thus the jurisdiction of the Civil Court was barred by s. 241 of the North-Western Provinces Land Revenue Act (XIX of 1873).

Mahesh Rai *v.* Chandar Rai 17

ACTS —1881—XII, s. 148. *Landholder and tenant—Suit for rent where the right to receive it is disputed—jurisdiction of Civil and Revenue Courts*] M sued I and another for rent in the Court of the Collector. The defendants pleaded payment to V, who was accordingly brought on to the record as a co-defendant under s 148 of the North-Western Provinces Rent Act (XII of 1881). The Collector decided in favor of V. The plaintiff appealed to the District Judge making all three persons respondents. The District Judge reversed the decision of the Collector and ordered the whole costs to be paid by V who thereupon appealed to the High Court.

Held that the District Judge had no jurisdiction to entertain the appeal so far as the party brought in under s. 148 was concerned, and, that being so, had no power to award costs against him.

Mirza Anand Ram *v.* Mausuma Begum 364

———————, s. 177.—*See* Acts—1873—XIX ss. 166, 168 and 188.

———————, s. 189. *Act XII of* 1886, (*amending Act XII of* 1881) *s.* 5—"*Rent payable by the tenant*"—*Appeal.*] The words "rent payable by the tenant" in s 189 of the North-Western Provinces Rent Act (XII of 1881) (as amended by Act XIV of 1886) mean the rate of rent payable by the tenant and not merely the actual amount of money which is due at any given time by the tenant to his landlord as rent.

Radha Prasad Singh v. Pergash Rai 193

———1882—IV, ss. 3 AND 6; CHAP. IV *passim*. *See* Mortgage.

———————ss. 40, 58*(b)*, 69, 100. *Mortgage—Hypothecation—Charge—Lien—Transfer of interest in immovable property—Construction of document—Words—*"*Arh*"—"*Mustaghraq*"—*Power of sale in default*—Bonâ fide *purchaser for value without notice—Rights of purchaser at sale in execution of decree*] In January 1883 a decree was obtained upon a bond executed in October 1875, whereby certain immoveable property was made security for a loan, the transaction being described not by the word "*rehan*" or mortgage, but by the words "*arh*" and "*mustaghraq*." The instrument contained no express covenant for sale of the property in default of payment, but it contained a covenant prohibiting alienation until payment, and a stipulation that, in the event of the property specified being destroyed or proving insufficient to satisfy the debt, the obligee might realize the amount from the obligor's person and other property. The decree directed the sale of the property as in the terms of an ordinary decree for the sale of mortgaged property. In 1885, before any steps had been taken in execution of the decree, the same property was sold in

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execution of a simple money decree against the obligor, and the purchaser obtained possession. It was found as a fact that at the time of the sale the bond of October 1875, and the decree thereon of January 1883, were not notified, but through no fault of the obligee decree-holder, and that the purchaser was a *bonâ fide* transferee for value without notice of the bond and decree.

Held that the words "*ark*" and "*mustaghraq*" used in the bond implied a power of sale in default and denoted a mortgage without possession: that the transaction, though entered into prior to the passing of the Transfer of Property Act (IV of 1882), must be regarded as amounting to a simple mortgage as defined in s. 58*(b)* of that Act, and not as merely creating a charge as defined in s. 100; and that consequently the rights of the obligee must prevail over those of the subsequent *bonâ fide* purchaser for value without notice of the bond and the decree thereon.

Held also by Mahmood, J., that the title of the judgment-debtor at the time of the sale in 1885 in execution of the simple money decree was subject to the mortgage decree of January 1883, and the purchaser at that sale could acquire no higher title than the judgment-debtor possessed, and was equally bound by the terms of the decree of January 1883, in respect of the property which he had purchased, and could not prevent the property being sold under that decree except by paying up the decretal money. *Unnopoorna Dassee* v. *Nufur Poddar* and *Rajah Enayet Hossein* v. *Giridhari Lal* referred to.

Per Mahmood, J.—The power of sale mentioned in s. 58*(b)* of the Transfer of Property Act is not a power in the mortgagee to bring the mortgaged property to sale independently of a Court. The observations on this point of Muttuswami Ayyar, J., in *Rangasami* v. *Muttu Kumarappa*, of Birdwood and Jardine, JJ., in *Khemji Bhagvandas* v. *Rama* and of Petheram, C.J., in *Sheoratan Kuar* v. *Mahipal Kuar*, dissented from.

The nature of simple mortgage, hypothecation, charge, and lien discussed.

Aliba v. *Nanu*, *Martin* v. *Pursram*, *Raj Coomer Ram Gopal Narain Singh* v. *Ram Dutt Chowdhry*, *Moti Ram* v. *Vilai*, *Gopal Pandey* v. *Parsotam Das*, *Shib Lal* v. *Ganga Prasad*, *Girdhar Ranchoddas* v. *Hakamchand Revachand*, *Sobhagchand Gulabchand* v *Bhaichand*, *Naran Purshotam* v. *Daolatram Virchand*, and *Durga Prasad* v. *Shambhu Nath* referred to.

Kishan Lal v. Ganga Ram 28

ACTS—1882—IV, ss 52 AND 53. *Contribution—Lis pendens.*] Two properties, A and B, belonging to different owners, were mortgaged under a joint bond for the same debt. The mortgagee put his bond in suit, and, having obtained a decree, caused property A to be sold, the proceeds of which proved more than sufficient to satisfy the whole mortgage-debt. Before such sale, however, X had, in execution of a simple money-decree, acquired a share in property A. X accordingly sued for contribution from property B, in that, so far as his share in property A went, he had satisfied the mortgage-debt, and ultimately obtained a decree in his favor; but, during the pendency of that litigation, property B had been transferred to Y.

Held that Y must take the property subject X's right to contribution from it in respect of the loss of his share in property A.

Baldeo Sahai v. Baij Nath 371

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ACTS—1882 IV ss. 67, 88. *Mortgage-bond—Interest post diem—Damages.*] Interest *post diem* on a mortgage-bond for a term certain and containing no express provision as to the payment of *post diem* interest is nothing else than damages for the breach of a contract.

Such interest cannot be regarded as a mere continuance of the *ad diem* interest due on the mortgage-bond, and, as such, as forming an integral part of the mortgage-debt, nor even as resembling such interest and forming a "charge" upon the property, though nominally damages. In respect of *post diem* interest given by way of damages, no distinction is to be drawn between simple bonds and mortgage bonds. *Mansab Ali* v. *Gulab Chand* and *Bhagwant Singh* v. *Daryao Singh* followed; *Cook* v. *Fowler*; *Bishen Dayal* v. *Udit Narain*; and *Rajpati Singh* v. *Kesh Narain Singh* referred to.

Sri Niwas Ram Pande *v.* Udit Narain Misr 330

———————, s. 83. *See* Mortgage.

——————— ss. 88 and 89. *Execution of decree—Application for order absolute for sale—Mortgage*] The holder of a decree under s. 88 of the Transfer of Property Act (IV of 1882) applied for execution to the Court charged with execution of the decree.

Held that this was a good application under s. 89 of the Act, and that it was not necessary that such application should be made to the Court which had passed the decree. An application for an order absolute for sale under s. 89 of the Transfer of Property Act (IV of 1882) is a proceeding in execution and subject to the rules of procedure governing such matters.

Oudh Behari Lal *v.* Nageshar Lal 278

———————, s. 90. *Mortgage—Decree against the person and other property of the judgment-debtor as well as against the property mortgaged.*] In a suit for enforcement of a mortgage security the plaintiff prayed for a decree both as against the mortgaged property, and also, in the event of the mortgaged property not realising sufficient to satisfy his claim, as against the other property and the persons of the defendants, and the decree which the plaintiff obtained was framed in accordance with the prayer in the plaint, that is to say, the decree expressly provided that, should the mortgaged property not realise sufficient to satisfy the amount decreed to the plaintiff, the other property of three, and the persons of two, of the judgment-debtors were to be liable

Held that such a decree could be executed against the persons and other property of the parties named therein, without its being necessary for the decreeholder to obtain a separate decree under s. 90 of the Transfer of Property Act (Act IV of 1882).

Miller v. *Digambari Debya*; referred to.

Batak Nath *v.* Pitambar Das 360

———————, s. 90. *Nature of decree contemplated by that section—Execution of decree.*] The plaintiff obtained a decree on a hypothecation bond, the decree providing that the money secured by the bond was to be realised by sale of the hypothecated property, and, if that proved insufficient to satisfy the decree, by sale of other property of the judgment debtor. The hypothecated property was sold and the proceeds were not sufficient to satisfy the decree. The decree-holder thereupon applied for enforcement of that portion of the decree which related to the other property of the judgment-debtor. To this application it was objected that it was necessary to obtain a decree under

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s. 90 of the Transfer of Property Act (IV of 1882). This objection was allowed and the decree-holder applied for and obtained a decree under the said section. The judgment-debtor then appealed against that decree on the ground, amongst others, that, looking to the terms of the original decree, the application under s. 90 was superfluous.

Held that the decree contemplated by s. 90 of the Transfer of Property Act is, in fact, an order to be obtained in execution of a decree for sale; and though in the present instance the application for such a decree may have been superfluous, it may nevertheless be regarded as an application for execution of a decree by enforcement of a portion of it against property other than the mortgaged property. *Miller* v. *Digambari Debya*, distinguished; *Hafiz ud-din Ahmad* v. *Damodar Das*, and *Raj Singh* v. *Parmanand*, referred to.

Durga Dai *v.* Bhagwat Prasad 356

ACTS—1882—IV, s. 135. *Actionable claim—Transfer of claim for an amount less than its value—Suit by transferee to enforce claim—Defendant not entitled to plead that terms of transfer were unconscionable.*] A mortgagee by conditional sale having obtained an order for foreclosure under Regulation XVII of 1806, his heirs, who were out of possession, executed a deed of assignment to a third person, transferring to him the rights acquired by the mortgagee under that order. At the time of the execution of the deed no steps had been taken by the mortgagee or his heirs to bring a suit for declaration of their title and for possession of the property. A suit for that purpose was brought by the assignee, the defendants being the conditional vendors and also the assignors under the deed above-mentioned. The latter made no defence, but admitted the justice of the claim, and a decree was passed in favour of the plaintiff against them as well as against the other defendants.

Held that the answering defendants, the conditional vendors, could not take advantage of the terms of the assignment for the purpose of defeating the claim, on the ground that the assignment was an unconscionable bargain, so unfair that the Court should not enforce it. If a person who has an actionable claim against another chooses to sell it cheap, that is no reason why that other is to stand cleared and discharged of his liability to the assignor.

Held also that the answering defendants were entitled to the benefit contained in the first paragraph of s. 135 of the Transfer of Property Act (IV of 1882), and would be entitled to take the bargain off the plaintiff's hands by paying to him the price and incidental expenses of the sale with the interest on that price from the day that the plaintiff paid it to the date of its repayment to him. *Jani Begam* v. *Jahangir Khan*, followed. *Grish Chandra* v. *Kashisauri Debi* and *Khoshdeb Biswas* v. *Satar Mondol*, dissented from.

Hakim-un-nissa *v.* Deonarain 102

———1886—XIV, s. 5. *See* Acts—1881—XII, s. 189.

———————————. *See* Acts—1889—VII, ss. 9 and 19.

ACTS—1887—I, s. 3, CL. (13). *See* Acts—1887—XII. s. 21 cl. (*a*).

———————— IX, s. 25. *Small Cause Court—Judgment of Small Cause Court, what should be contained therein—Revision—Civil Procedure Code, ss.* 203, 562, 622, 647.] Section 203 of the Code of Civil Procedure does not relieve the Judge of a Small Cause Court from the

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necessity of giving some indication in his judgment that he has understood the facts of the case in which such judgment is given.

Where a judgment in a Small Cause Court suit stated merely that the suit was dismissed for reasons given in the Judge's decision in another suit, and the judgment in the suit so referred to was in the following words:—"Claim for recovery of money lent with interest. Reply. Defendant pleads that he has paid the debt to the plaintiff. Issue. Has the defendant paid the debt claimed to the plaintiff? Finding. It is not proved that the defendant paid the debt to the plaintiff. Ordered that the claim is decreed with costs":—*held* that this was, in fact, no judgment at all, and the case must be remanded for re-trial on the merits under the analogy of s. 562 of the Code of Criminal Procedure, read with s. 647 *ib.*

Malik Rahmat *v.* Shiva Prasád 533

ACTS—1887—IX, s. 36. *Suit pending in Court of Subordinate Judge with Small Cause Court powers—Transfer to Munsif's Court—Civil Procedure Code, s.* 25.] The plaintiff filed his suit as a Small Cause Court case in the Court of a Subordinate Judge having Small Cause Court powers. During the pendency of the suit the Subordinate Judge took leave and his successor was not invested with Small Cause Court powers. In consequence of this the District Judge made an order, under s. 25 of the Code of Civil Procedure, transferring all cases above the value of Rs. 50 then pending before the Subordinate Judge in his capacity as a Small Cause Court to the Munsif to be tried as Munsif's Court cases. The Munsif had Small Cause Court powers up to Rs. 50. The plaintiff's suit was for Rs. 69. The case was accordingly tried by the Munsif and the plaintiff appealed, his appeal coming before the same Subordinate Judge before whom the suit was filed.

Held that, granted that the suit was a Small Cause Court suit (which was not decided), whether s 25 of the Code of Civil Procedure or s. 35 of the Provincial Small Cause Courts Act (Act IX of 1887) was applicable, it would remain throughout a Small Cause Court suit and be subject to the incidents of such a suit.

Mangal Sen *v.* Rup Chand 324

———XII, s. 21, CL. (*a*). *Act I of* 1887, *s.* 3, *cl.* (13)—"*Value of the original suit*"—"*Amount or value of the subject matter of the suit*"—*Jurisdiction—Civil Procedure Code, s.* 2—*Decree, definition of.*] For the purpose of determining the proper appellate Court in a Civil suit what is to be looked to is the value of the original suit that is to say, the "amount or value of the subject matter of the suit." Such "amount or value of the subject matter of the suit" must be taken to be the value assigned by the plaintiff in his plaint and not the value as found by the Court, unless it appear that, either purposely or through gross negligence, the true value of the suit has been altogether misrepresented in the plaint.

An order of a District Judge returning a memorandum of appeal to be presented in the proper Court on the ground that the value of the suit is beyond the pecuniary limits of his jurisdiction is not a decree within the meaning of s. 2 of the Civil Procedure Code.

Mahabir Singh *v.* Behari Lal 320

———s. 23, 24. *Jurisdiction—Exercise by Subordinate Judge of jurisdiction of District Court—Appeal.*] The words in s. 24 of the Bengal Civil Courts Act (XII of 1887) "subject to the rules appli-

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cable to like proceedings when disposed of by the District Judge," include the rules relating to appeals. Therefore orders passed under that section by a Subordinate Judge in proceedings under the Bengal Minors Act (XL of 1858) transferred to him under s. 23 (2) (*b*) of the former Act, are appealable to the High Court and not to the Court of the District Judge.

Sohna *v.* Khalak Singh 78

ACTS—1887—IX s. 25. *Small Cause Court—Revision—Circumstances under which the High Court will exercise its revisional powers under s. 25 of Act IX of* 1887] Section 25 of the Provincial Small Cause Courts' Act (Act IX of 1887) was not intended to give in effect a right of appeal in all Small Cause Court cases, either on law or fact. The revisional powers given by that section are only exercisable where it appears that some substantial injustice to a party to the litigation has directly resulted from a material misapplication or misapprehension of law, or from a material error in procedure. *Muhammad Nizam-ud-din Khan* v. *Hira Lal* and *Masum Ali* v. *Mohsin Ali* approved.

Muhammad Bakar *v.* Bahal Singh 277

———1889—VII, ss. 9 AND 19. *Order granting certificate conditioned on the filing of security—Appeal.*] Where on an application for a certificate of succession under the Succession Certificate Act (Act VII of 1889) an order was made granting the certificate conditionally on the applicant's furnishing security.

Held that this was not an order "granting, refusing or revoking a certificate" within the meaning of s. 19 of the Act, and that therefore no appeal would lie therefrom.

Bhagwani *v.* Manni Lal 214

ADOPTION. *See* Hindu law.

"ĂMÍN"—Right to pronounce 'ámín' loudly. *See* Muhammadan Law.

APPEAL—*Costs.* *See* Execution of decree.

———. *Decree conditional upon payment of a certain sum within a specified time—Appeal presented after the expiration of the time so fixed.*] The plaintiff in a pre-emption suit obtained a decree in his favour, conditional on payment into Court of a certain sum within a specified time, otherwise his suit was to stand dismissed. He did not comply with the terms of the decree, but, after the expiration of the term mentioned therein, appealed against it.

Held that the appeal would lie both in respect of the sum fixed by the decree to be paid by the plaintiff-appellant, and the discretion of the Court as regards the period allowed for payment.

Kodai Singh v. Jaisri Singh 189

———. *Mortgage—Redemption.* *See* Court-fee.

———. *See* Acts—1887—XII, ss. 23, 24.

———. *See* Civil Procedure Code, ss. 411, 412.

———. *See* Civil and Revenue Courts.

APPLICATION FOR LEAVE TO APPEAL IN FORMÁ PAUPERIS. *See* Limitation.

ARBITRATION. *See* Civil Procedure Code. ss. 508, 514, 521.

ASSESSORS. *See* Criminal Procedure Code, ss. 268, 285.

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ASSIGNMENT IN SATISFACTION OF DECREE, *See* Civil Procedure Code, ss. 258 and 283.

AWARD. *See* Civil Procedure Code, ss. 522, 525.

BONA FIDE PURCHASER FOR VALUE WITHOUT NOTICE. *See* Acts—1882—IV, ss. 40, 58*(b)*, 69, 100.

BURDEN OF PROOF. *See* Hindu Law.

———————————. *See* Landholder and tenant.

CAUSE OF ACTION. *See* Right of suit.

CHARGE. *See* Acts—1882—IV, ss. 40, 58*(b)*, 69, 100.

CIVIL AND REVENUE COURTS. *Jurisdiction—Appeal—Erroneous exercise of Jurisdiction by subordinate Court capable of being made a ground of appeal to the High Court.*] Where the High Court is the Court of appeal from any particular subordinate Court, and that Court acts without jurisdiction in the trial of a suit or an appeal before it, the High Court has power as an appellate Court to set right the proceedings of such subordinate Court. *Kishna Rám* v. *Hingu Lál* and *Tota Rám* v. *Ishur Das* overruled.

Jwala Prasád *v.* Salig Rám 575

———————————. *See* Acts—1881—XII, ss. 10, 95*(a)*.

CIVIL PROCEDURE CODE, s. 2. *See* Acts—1887—XII, s. 21, cl. (*a*).

———————————, ss. 2, 293, 540, 588. *Execution of decree—Default of purchaser at sale in execution—Deficiency in price arising on re-sale—Order against defaulter to make good such deficiency—No appeal from such order.*] No appeal lies from an order under s 293 of the Code of Civil Procedure directing a defaulting purchaser at a sale in execution of a decree to make good the loss happening on a re-sale occasioned by his default. *Soudagar Mal* v. *Abdul Rahman Khán* and *Tapesri Lál* v. *Deokinandan Rai* followed.

Ilahi Bakhsh *v.* Baij Nath 569

———————————, ss. 2, 244, CL. (*c*), 540. *See* Execution of decree.

———————————, s. 13. *See* Acts—1873—XIX, s. 113.

———————————, ss. 13, 43. *Res judicata.*] The dismissal of a suit to have set aside an order made in one district, for the sale of the plaintiff's interest in property therein, is not a bar under ss. 13 and 43, Civil Procedure, to another suit to obtain relief against an order in another district for the sale of property therein belonging to the same plaintiff, or of other property not included in the order or sale against which the dismissed suit was directed.

An operative decree, obtained after the death of a defendant, ascertaining for the first time, the extent and quality of his liability, the latter having been already declared in general terms in a prior decree, cannot bind the representatives of the deceased, unless they were made parties to the suit in which such ascertainment was pronounced.

Radha Prasad Singh *v.* Lal Sahab Rai 53

———————————, s. 25. *See* Acts—1887—IX, s. 35.

———————————— s. 111. *See* Suit for balance of account.

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CIVIL PROCEDURE CODE, ss. 191 AND 342. *Magistrate taking cognizance of an offence on his own personal knowledge—Right of accused to have the case transferred—Power of Magistrate to question the accused*] Where a Magistrate was found to have taken cognizance of an offence under cl (*c*) of s. 191 of the Code of Criminal Procedure, *Held* that he had no power, on an application being made under the last clause of the section above-named, to refuse to transfer the case.

Held also that where a Magistrate, before evidence taken for the prosecution, put questions to the accused of the nature of a cross-examination, such procedure was illegal, as it could not be said that the questions were put " for the purpose of enabling the accused to explain any circumstances appearing against him in the evidence" within the meaning of s 342 of the Code of Criminal Procedure.

Queen-Empress *v.* R. Hawthorne 345

———————————, ss. 203, 562, 622, 647. *See* Acts—1887—IX, s. 25.

———————————, s. 206. *See* Acts—1877—XV, sch. ii, art. 179 (4).

———————————, s. 232. *See* Execution of decree *and* Acts—1877—III ss. 3, 17, 47, 49.

———————————, ss. 258 AND 283. *Execution of decree—Attachment—Previous assignment in satisfaction of decree of third party—Suit by assignee to establish right to attached property.*] Where a regular suit under s 283 of the Code of Civil Procedure was brought to establish the plaintiff's right to certain attached property on the allegation that the property attached had been transferred to him in satisfaction of a decree held by him against the judgment-debtor.

Held that it was not necessary that such transfer should be certified under the provisions of s. 258 of the Code of Civil Procedure. The prohibition to take cognizance of adjustments and payments referred to in s. 258 above-mentioned relates only to the Court executing the decree.

Kalyan Singh *v.* Kamta Prasad 339

———————————, s. 268 (*a*). *Attachment of debt—Order prohibiting creditor from recovering debt—Suit for rent under attachment—Act XV of* 1877 (*Limitation Act*), *s.* 15—*Injunction or order staying a suit.*] S. 268, clause (*a*) of the Civil Procedure Code, does not mean that, while a debt is under attachment, the person to whom the debt was originally owing should be barred from bringing a suit in respect of it. What it prohibits is the recovery of the debt, and the payment of it by the debtor to the creditor.

Semble—An order of attachment under s. 268 of the Civil Procedure Code is not an injunction or order staying a suit within the meaning of s. 15 of the Limitation Act (XV of 1877).

Shib Singh *v.* Sita Ram 76

———————————, s. 274. *See* Execution of decree.

———————————, ss. 295, 315. *Execution of decree—Sale in execution—Sale set aside—Suit by purchaser for return of purchase money.*] Where an auction purchaser seeks to have refunded the price paid by him for property sold in execution of a decree, on the ground that at the time of sale the judgment-debtor had no saleable interest

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therein, it is competent to him to proceed by way of a regular suit against the person into whose hands such price has come as such person's rateable share of the assets of the judgment-debtor, under s 295 of the Code of Civil Procedure He is not limited to the procedure in the execution department mentioned in s. 315 of the said Code.

Munna Singh v. *Gajadhar Singh* followed.

Kishun Lal v Muhammad Safdar Ali Khan 383

CIVIL PROCEDURE CODE, ss. 336, 344.] *Surety, liability of—Judgment-debtor applying to be declared an insolvent*] A person who executes a bond undertaking to produce a judgment-debtor at any time when the Court should direct him to do so, and standing security under s. 336 of the Civil Procedure Code for the judgment-debtor's applying to be declared insolvent, is released from his obligation under the bond when the judgment-debtor files his petition under s 344 to be declared insolvent. *Koylash Chandra Shaha* v. *Christophoridi* (1) approved.

Ramzan v. Gerard 100

———————, 373. *See Res judicata.*

———————, ss. 411, 412. *Suit in formâ pauperis—Appeal—Right of Government to appeal in respect of Court-fee on portion of plaintiff's claim dismissed.*] In a suit *in formâ pauperis* the District Judge decreed the plaintiff's claim in part and dismissed it in part, but omitted to make any provision for payment to Government of the court-fee on the portion which was dismissed. The Secretary of State, not having been a party to the litigation in the Court below, then preferred an appeal in respect of the court-fee on that portion of the plaintiff's claim which had been dismissed.

Held that such an appeal would lie; though the more suitable procedure would have been for the Government to have applied, through the Collector, to the Court of first instance to review its judgment and to repair the omision in its decree. *Janki* v. *The Collector of Allahabad* referred to.

The Secretary of State for India in Council v. Bhagwanti Bibi ... 326

———————, ss. 508, 514, 521. *Arbitration under the Civil Procedure Code—Invalidity of award when not made within the time fixed by the Court—Costs*] When once an award has been delivered it is no longer competent to the Court to grant further time, or to enlarge the period for the delivery of this award under s. 514 of the Code of Civil Procedure.

Where an award was not made within the period fixed by the Court's order but was made after the date given in the last order extending the time for its delivery, *held*, that the award was invalid. The decree of the Court dealing with the award as if duly made within the time, could not be treated as enlarging it.

The judgment in *Chuha Mal* v. *Hari Ram* approved.

Order to be that the suit should proceed. Neither party to be entitled to costs in either Court below after the first judgment with regard to the stage at which the objection was taken; and the costs prior to that to abide the issue.

Rája Har Narain Singh v Chaudhrain Bhagwant Kuar ... 300

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CIVIL PROCEDURE CODE; ss. 522, 525. *Award—Decree on an award filed in Court, how to be framed—Appeal from such decree.*] When an award has been filed in Court, as provided by s. 525 of the Code of Civil Procedure, the judgment and decree based thereon must be drawn up specifically in terms of the award. If the decree merely decrees in general terms the claim of one party or of the other, it cannot be said that such decree is in accordance with the award, and being "not in accordance with the award" an appeal will lie therefrom.

Ummi Fazl *v.* Rahim-un-nissa 360

———————————, s. 542. *Second Appeal—Plea sought to be raised that was not taken in the memorandum of appeal.*] Section 542 of the Code of Civil Procedure was intended to confer upon the Court a power exercisable by it alone; it was not intended to enable an appellant to take the respondent by surprise by urging matter of which he had no notice.

Bansidhar *v* Sita Ram 381

———————————, s. 544. *See* Acts—1877—XV, sch. ii, No. 179(2).

———————————, s. 559. *Power of appellate Court to add respondent—Limitation.*] The power of an appellate Court to make a person a respondent, under s. 559 of the Civil Procedure Code, is not affected by the Limitation Act (XV of 1877).

In exercising its powers under s. 559 of the Civil Procedure Code, an appellate Court is competent to make a person a respondent who, in the original suit, was arrayed on the same side with the appellant.

Sohna *v.* Khalak Singh 78

CONSTRUCTION OF DOCUMENT. *Deed—Sale-deed or deed of gift.*] A deed which purported on the face of it to be a deed of sale contained a recital that the consideration had been received by the vendor and returned as a gift to the vendee. The words used were—"Hath * * * nawasi apne ki bai katai karke zar-i-saman tamâm wo kamâl wasul pakar bakhsh diya aur hiba kardiya."

The deed was stamped as a sale-deed and was duly registered, but no possession was given under it, and there was apparently no evidence external to the deed that any consideration had passed between the parties.

Held by EDGE, C. J., and TYRRELL and KNOX, J.J., that in the absence of any evidence external to the deed itself of the intention of the parties, the deed in question must be taken to be a deed of sale.

per MAHMOOD, J., *contra*—The lower appellate Court having found that no consideration had passed, the deed must be considered as a deed of gift, though wearing the appearance of a sale-deed, and, possession not having been given, under Muhammadan Law the gift was invalid.

Angan Lal *v.* Muhammad Husain 409

CONSTRUCTION OF WAJIB-UL-ARZ. *See* Wajib-ul-arz, effect of as evidence of village custom.

CONTRIBUTION. *See* Acts—1882—IV, ss. 52, 53.

COSTS—*Appeal.* *See* Execution of decree.

———*Arbitration.* *See* Civil Procedure Code, ss. 508, 514, 521.

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COUNSEL AND CLIENT. *Authority of counsel to compromise a case on behalf of his client—Nature of power conferred by counsel's retainer*]. A counsel, unless his authority to act for his client is revoked and such revocation is notified to the opposite side, has, by virtue of his retainer and without need of further authority, full power to compromise a case on behalf of his client; and the Court will not disturb a compromise so entered into, unless it appears that it was entered into under a mistake and that some palpable injustice has been thereby caused to the client. *Strauss* v *Francis; Matthews* v *Munster* and *In re West Devon Great Consols Mine* referred to.

Jang Bahadur Singh *v.* Shankar Rai 27

COURT-FEE. *Mortgage—Redemption—Decree for redemption conditional on payment of a certain sum—Appeal by mortgagor—Court fee payable on memorandum of appeal—Act VII of* 1870 (*Court-Fees Act*), *s* 7, *cl.* ix.] Where a mortgagor sues for redemption on the allegation that the mortgage debt has been satisfied, and a decree for redemption is passed on payment of a certain amount, and the mortgagor appeals against the amount he is ordered to pay, the court-fee payable on the memorandum of appeal must, under s. 7, cl. ix of Act VII of 1870, (Court-Fees Act), be computed according to the principal money expressed to be secured by the instrument of mortgage, and not according to the balance which the mortgagor alleges to be due.

Semble.—If the decree had allowed redemption on payment of a certain sum, and the defendant mortgagee was appealing on the ground that the amount due was greater than that sum, the court-fee should be calculated on the difference between the sum mentioned in the decree and the amount alleged by the appellant to be due.

Pirbhu Narain Singh *v.* Sita Ram 94

———. *See* Suit, for declaratory decree.

CRIMINAL PROCEDURE CODE, ss. 133, 136, 140. *Act XLV of* 1860, *s.* 188—*Disobedience to order duly promulgated by public servant.*] A person against whom an order under s. 133 of the Code of Criminal Procedure is passed, who neglects to take any steps whatever in respect of such order within the time therein specified, either by way of compliance therewith or by way of objection thereto in the manner prescribed by law, renders himself liable to be proceeded against under s. 188 of the Indian Penal Code without its being necessary to wait until the order has been made absolute. If such order is made absolute under s 140 of the Code of Criminal Procedure, further proceedings can then be had, under s. 188 of the Indian Penal Code, against the person disobeying the order absolute. When an order under s. 133 of the Code of Criminal Procedure has been made absolute under s. 140 *ib.*, its validity cannot subsequently be questioned. *Queen-Empress* v. *Narayana* approved.

Queen-Empress *v.* Bishambar Lál 577

———————, s 145 *Order for interim possession—Point of time possession at which is to be looked at in determining which party is entitled to an order under s.* 145.] The possession which a Magistrate acting under s. 145 of the Code of Civil Procedure has to find and support is possession at the time of the Magistrate's proceedings. Hence where a Magistrate decided a question of possession under s. 145 upon evidence taken six months previously—*Held* that such order was irregular and unsustainable.

In the matter of the petition of Jai Lal 362

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CRIMINAL PROCEDURE CODE, ss. 268, 285. *Sessions Court—Assessors—Assessors prevented by death or illness from attending a trial.*] During the course of a trial before a Sessions Court with three assessors, one assessor died at an early stage of the proceedings. Later on another assessor became too ill to take any further part in the trial, and the third assessor was obliged to retire at the beginning of the accused's pleader's address to the Court and did not return until it was finished.

Held that the law contemplated the continuous attendance of at least one assessor throughout the trial. This condition not having been fulfilled, the proceedings before the Sessions Court must be set aside as having (with regard to the provisions of s. 268 of the Code of Criminal Procedure) been held before a Court not having jurisdiction.

Queen-Empress *v.* Muhammad Mahmud Khan 337

———————————, ss. 420, 421, 422 AND 423. *Criminal appeal—Appeal preferred by appellant in jail—Power of Appellate Court to dispose of appeal in absence of the appellant.*] Where an appeal, preferred under s. 420 of the Criminal Procedure Code, has been admitted by the appellate Court, and notice has been properly given under s. 422, and the record of the case has been sent for and perused under s. 423, the appellate Court is competent, under the last-mentioned section, to dispose of the appeal though the appellant is not present and is not represented by a pleader.

The only limitation placed by s. 423 on the powers of the appellate Court is that the Court, before disposing of the appeal, must peruse the record, and, if the appellant is present or is represented by a pleader, the appellant in person must be heard, or the pleader must be heard.

So *held* by the Full Bench, Mahmood, J., dissenting.

Held by Mahmood, J, *contra*, that the principles of *audi alteram partem* and *ubi jus ibi remedium*, and the provisions of s. 422 of the Code, as to notice of appeal, imply that, where an appeal is admitted and not summarily rejected under s. 421, the appellant must have a real opportunity of being heard; that in the passage in s. 423 "after perusing the record and hearing the appellant or his pleader if he appears," the word "he" refers to the pleader, and must not be read as "either of them"; that, in any case, the words "if he appears" make it a condition precedent to the disposal of an appeal under the section that the appellant is heard, or at least has the choice of appearing; that the word "appears" refers to the *personal* appearance of the appellant; and that an appeal which has been admitted cannot be disposed of unless the appellant is before the appellate Court, or can be heard within the meaning of s. 423.

Semble, per Mahmood, J., but the High Court in appeal is competent to send for a criminal to appear before it to explain a difficulty in his case,

Queen-Empress *v.* Pohpi 171

CRIMINAL APPEAL. *See* Criminal Procedure Code, ss. 420, 421, 422 and 423.

CRIMINAL PROCEDURE CODE, s 488. *Order for maintenance of wife—Wife living apart from her husband for good cause.—Jurisdiction.*] Where a wife after a temporary absence from her husband on a visit, found on her return that he was living with another woman and there upon left him and went to live in a different district and in that district applied for an order for maintenance against her husband.

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Held that, the wife being justified in refusing to live with her husband and in choosing her own place of residence, the neglect of her husband to maintain her was an offence within the jurisdiction of the appropriate Court at the place were the wife resided—*In re the petition of Shaikh Fukrudin*, distinguished—*In the matter of the petition of W. B. Todd*, followed.

In the matter of the petition of Malcolm De Castro ... 348

DAMAGES. *See* Acts—1882—IV, ss. 67, 88.

DEBT, ATTACHMENT OF, *See* Civil Procedure Code, s. 268 *(a)*.

DEED OF GIFT. *See* Construction of document.

EJECTMENT. *See* Acts—1877—I, s. 9.

EXECUTION OF DECREE. *Act XV of* 1877 (*Limitation Act*) *sch. ii, art.* 179 (4)—"*Step in aid of execution*"—*Application by transferee of decree for sale of hypothecated property—Non-registration of deed of assignment—Civil Procedure Code, s.* 232—*Act III of* 1877 (*Registration Act*), *ss.* 3, 17, 47, 49—*Effect of subsequent registration.*] On the 13th November 1886, the assignee of a decree for sale of hypothecated property applied, under s. 232 of the Civil Procedure Code, for execution of the decree, but, objection being raised, that the deed of assignment had not been registered, subsequently applied for the return of the deed that it might be registered, and it was returned accordingly. The deed was afterwards duly registered. The next application for execution of the decree was made on the 25th April 1888.

Held (i) that the deed of assignment was not a document which comprised immovable property within the meaning of s 49 of the Registration Act (III of 1877), a decree for sale not being immovable property as defined in s. 3;

(ii) that consequently, although the assignee might not, under the latter portion of s. 49, use the deed for the purpose of proving his title, there was no provision in the Act saying that he should not take title under the deed;

(iii) that the position of the assignee when he made his application on the 13th November 1886 was that he was unable to prove that there was a title by assignment in himself;

(iv) that the subsequent registration cured the absence of registration on the 13th November 1886, and, under s. 47 of the Registration Act, the document thereupon had full effect, and related back to its execution;

(v) that the application of the 13th November 1886 was a step in aid of execution of the decree within the meaning of art. 179 (4) of sch. ii of the Limitation Act (XV of 1877), and that the application of the 25th April 1888 was within time.

Abdul Majid *v.* Muhammad Faizullah 89

——— ———. *Attachment—Incorrect description of property sought to be attached—Subsequent purchase of same property under a decree for pre-emption—Civil Procedure Code, s.* 274.] In execution of a simple money decree against the holders of a *muáfi* interest in a certain village, who did not possess any zamíndári interest in that village, an attachment was obtained by the decree-holder in 1884 of "an eight biswas zamíndári share of mauza *D*," and under that attachment a sale took place in January 1886. Meanwhile in December 1885, a decree for pre-emption in respect of a sale by the judgment-debtors in 1881 of

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their *muáfi* interests in the village, was decreed in favour of persons who were not parties to the litigation in which the attachment of 1884 was effected. The plaintiffs (who were in possession) sued for a declaration of their right to the *muáfi* interests as against the auction-purchaser under the sale of January 1886.

Held that the attachment in 1884 was not a good attachment of the *muáfi* interests of the judgment-debtors, and the auction-purchaser could not be held to have purchased those *muáfi* interests, and the title of the plaintiffs under their pre-emptive decree of December 1885 must prevail.

Hargu Lal Singh *v* Muhammad Raza Khan 119

EXECUTION OF DECREE *Decree of appellate Court—What that decree should contain*] Where the judgment of an appellate Court directed that a certain sum over and above what had been decreed to him in the Court of first instance should be decreed to the appellant, but the decree of the appellate Court did not specify the sums that would be due to the appellant under that decree, except by reference to the judgment on which it was based and to the decree of the Court of first instance :—

Held that though the decree as thus drawn was informal, yet, as the amount due to the decreeholder was ascertainable from the record, and the decree was thus practically capable of execution, execution should, as a matter of equity, be granted to the decreeholder.

Jawahir Mal *v.* Kistur Chand 343

———————————. *Decree conditioned on payment of a sum certain within a fixed time—Payment after time specified in decree.*] A Court, having framed a decree conditioned on the payment by the plaintiff of a sum certain within a specified time has no power to extend the time for payment after the period mentioned in the decree has elapsed. *Raja Har Narain Singh v. Chaudhrain Bhagwant Kuar*, referred to.

Ram Lal Dube *v.* Har Narain 400

———————————. *Decree to be executed where there has been an appeal*] Where the appellate Court has modified the decree of the Court below, the decree of the appellate Court supersedes entirely that of the Lower Court, and is the only decree which can be executed. *Shohrat Singh* v. *Bridgman*, *Gobardhan Das* v. *Gopal Ram*, and *Muhammad Sulaiman Khan* v. *Muhammad Yar Khan*, referred to.

Nourang Rai *v.* Latif Chaudhri 394

———————————. *Party improperly brought on the record as representative of deceased Judgment-debtor—Appeal—Costs—Civil Procedure Code, ss.* 2, 244, *cl.* (*c*), 540.] One B. D. was made a party to an application for execution of a decree as one of the representatives of a deceased judgment-debtor. It had been decided in a previous suit that B. D. was not related to the judgment-debtor in such a manner that he could become his legal representative, and in this proceeding also he objected that he was not such representative, and his objection was allowed, and the order allowing it remained unappealed and became final. The Court, however, while allowing the objection, did not give the objector his costs.

Held that the objector did not, by being improperly brought into the execution proceedings, lose his right of appeal, and further, that he could under the circumstances appeal on the question of costs alone.

Bishen Dayal *v.* The Bank of Upper India, Limited ... 290

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EXECUTION OF DECREE. *See* Acts—1877—XV sch. ii, No. 179 (2).
———————. *See* Acts—1877—XV sch ii, No. 179 (4).
———————. *See* Acts—1877—XV., sch. ii, No. 179, cl. (4).
———————. *See* Acts—1882—IV, s 90.
———————. *See* Acts—1882—IV, ss. 88 and 89.
———————. *See* Civil Procedure Code, ss. 2, 293, 540, 588.
———————. *See* Civil Procedure Code, s. 268 (*a*).
———————. *See* Civil Procedure Code, ss. 13, 43, Mesne Profits, *and* Parties.
———————. *See* Civil Procedure Code, ss. 295, 315.
———————. *See Res judicata.*

EX-PROPRIETARY TENANT. *See* Acts—1881—XII ss. 9, 31.

GIFT. *See* Construction of document.

GUARDIAN. *See* Acts—1858—XL, s 7.

HINDU LAW. *Adoption by widow to deceased husband.—Deed of adoption, construction of—Powers of adoptive mother.*] The widow of a separated Hindu made an adoption to her deceased husband under a power to adopt conferred upon her by her husband's will. The deed by which the adoption, the validity of which was not disputed, was evidenced, contained, amongst others, the following conditions :—"that during my (*i.e.*, the adoptive mother's) lifetime, I shall be the owner and manager of the estate, and that after my death the adopted son should have the same rights and privileges as would have been enjoyed by the natural son of Ishan Chandar Mukarji born of me."

Held that these words conferred upon the widow an interest and an authority not less than she would have had as the widow of a separated sonless Hindu to whom no adoption had been made, so far as her position as manager was concerned.

Kali Das *v.* Bijai Shankar 391

———————. *Evidence of partition of joint family—Presumption.*] In a suit to enforce an alleged right of one brother against another, to separate proprietary possession of a share in joint family estate, the concurrent findings of the Courts below were definitely to the effect that a partition had taken place, after which the brothers had been no longer joint as to their interests.

The Courts had fully gone into the case on either side, receiving the evidence offered by either party, and they had considered the whole of it. Therefore it could not be effectively urged, as a ground of appeal, that the Courts below, in coming to the above conclusion, had erred in putting the burden of proof unduly upon the plaintiff, or disregarded the presumption arising from the original state of the family.

Ram Charan *v.* Debi Din... 165

———————. *Joint Hindu family—Mortgage executed by father on the whole joint family property in respect of his own debts—Liability of sons—Burden of proof.*] The father of a joint and undivided Hindu family executed a mortgage over the whole immovable property of the joint family. The mortgagees having obtained a decree on their mortgage and having put an attachment on the joint

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family property, the minor sons of the mortgagor sued for a declaration that their interest in the attached property was not liable under the mortgagee's decree, inasmuch as the debts in respect of which the mortgage had been executed had been contracted for immoral purposes, and were not such as they, by the Hindu law, were under a pious obligation to discharge. *Held* that the burden of proving that the debts in question were contracted for the purposes alleged lay on the plaintiffs.

Beni Madho v. *Basdeo Patak* followed; *Lal Singh* v. *Deo Narain Singh*, *Basa Mal* v *Maharaj Singh*, *Subramanya* v. *Sadasiva*, *Hanooman Persaud Panday* v *Munraj Koonweree*; and *Bhagbut Pershad Singh* v. *Girja Koer*, referred to.

Bhawani Bakhsh *v.* Ram Dai 216

HINDU LAW. *Succession to the "gaddi" of a temple—Nature of evidence required to prove title to succeed—Explanation of terms "nihang" and "grihast."*] *Per* EDGE, C J and MAHMOOD, J.—The question who is entitled to succeed to the office of a deceased *Mahant* must be decided in each case upon the evidence as to the customs relating to succession observed by the particular sect to which the deceased *Mahant* belonged. It is necessary for the person claiming a right to succeed as *Mahant* to establish that right by satisfactory evidence He cannot derive any advantage from the weakness of his opponent's title.

Per MAHMOOD, J.—It was necessary for the plantiff in this case to prove that he was "*Nihang*," as distinguished from "*Grihast*," which he failed to do Meaning of the terms "*Nihang*" and "*Grihast*," explained.

Genda Puri v. *Chhatar Puri* referred to.

Basdeo *v.* Gharib Das 256

———. *Suit for restitution of conjugal rights—Desertion—Cruelty—Limitation—Act XV of* 1877 *(Limitation Act)*, *s.* 23, *sch. ii*, *Nos.* 34, 35, *and* 120] The texts of the Hindu law relating to conjugal cohabitation and imposing restrictions upon the liberty of the wife, and placing her under the control of her husband, are not merely moral precepts, but rules of law. The rights and duties which they create may be enforced by either party against the other and not exclusively by the husband against the wife. The Civil Courts of British India, as occupying the position in respect of judicial functions formerly occupied in the system of Hindu Law by the king, have undoubtedly jurisdiction in respect of the enforcement of such rights and duties The Civil Courts of British India can therefore properly entertain a suit between Hindus for the restitution of conjugal rights, or for the recovery of a wife who has deserted her husband.

It is not necessary, as a condition precedent to such suits, the parties being Hindus, that there should be any demand by the plaintiff and refusal by the defendant The provisions of arts. 34 and 35 of the second schedule of the Limitation Act cannot be taken as applicable to suits of this description. To hold that they did apply would be to introduce serious innovations into the personal law of the Hindus (and of the Muhammadans) which could not have been contemplated by a statute of the nature and scope of the Limitation Act. The limitation applicable to suits of the present nature is that of art. 120 of the second schedule, read with s. 23 of the Limitation Act.

Desertion by a wife of her husband is permitted by the Hindu Law under certain circumstances, but the insanity of the husband will not

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justify his desertion by the wife. In any case desertion does not terminate the relation of husband and wife A suit for restitution of conjugal rights could in such case only be effectually met by establishing a plea of some matrimonial offence on the part of the complainant such as would entitle the defendant to a separation. Legal cruelty on the part of the complainant may be a ground for refusing restitution of conjugal rights, or for imposing terms on the complainant.

Binda *v.* Kaunsilia 126

HYPOTHECATION. *See* Acts—1882—IV, ss. 40, 58 *(b)*, 69, 100.

INTEREST POST DIEM *See* Acts—1882—IV, ss 67, 88.

INTERPRETATION OF STATUTES. *See* Acts—1873—XIX, ss. 166, 168 and 188.

JOINT HINDU FAMILY. *See* Hindu Law.

JURISDICTION. *See* Acts—1882—XII, ss. 10, 95*(a)*.

————————. *See* Acts—1887—XII, s. 21, cl. (*a*).

————————. *See* Civil and Revenue Courts.

JUSTICE, EQUITY AND GOOD CONSCIENCE. *Succession to out-casted Bráhmin—Brothers of deceased remaining in caste—Sons of deceased by Bania widow*] Khuman, a Bráhmin, lived with a Bania widow, for which offence he was out-casted He left his family and his village and went to live elsewhere, taking the widow with him. He had sons by her, and he and his family lived as cultivators and acquired property. Khuman died in his new home and left the widow and their sons in possession of the property which he had acquired. This being so, the brothers of the deceased Khuman sold the property which had been thus acquired by him to one K K R K thereupon sued his vendors and the surviving sons of Khuman by the widow, together with their mother and the widow of a deceased son, for recovery of the property :—

Held that the sons of Khuman by the Bania widow with whom he had been living and their mother were entitled to remain in possession of the property acquired by Khuman as against the brothers of deceased who had remained in caste.

Radha Kishen *v.* Ráj Kuar 573

LANDHOLDER AND TENANT. *Suit for possession of fallen wood of self sown trees growing upon an occupancy-holding—Burden of proof.*] A zamíndár claiming a right to the fallen wood of self-sown trees which had been growing on an occupancy-holding must prove some custom or contract by which he is entitled to take such wood. The English law as to ownership under similar circumstances cannot be applied, and (*sed quære*) there is no general rule in India to decide that there is a right in the landlord or a right in the tenant by general custom to the fallen wood of self-sown trees.

Nathan *v.* Kamla Kuar 571

LIEN. *See* Acts—1882—IV, ss 40, 58*(b)*, 69, 100.

LIMITATION. *Application for leave to appeal in formâ pauperis—Subsequent appeal in regular form—Payment of Court-fee on appeal no retrospective effect*] Where an application for leave to appeal *in formâ pauperis* having been presented and rejected, a regular appeal was subsequently filed, but after the period of limitation had expired.

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Held that the payment of the court-fee on the regular appeal could not be held to relate back to the memorandum of appeal which accompanied the application for leave to appeal as a pauper, so as to convert that memorandum of appeal into an appeal within time. Until the regular appeal was filed there was nothing before the Court which it could treat, even provisionally, as a memorandum of appeal.

Bishnath Prasad *v.* Jagarnath Prasad 305

LIMITATION. *See* Acts—1877—XV, sch ii, Nos. 113 and 116.

————————. *See* Acts—1877—XV, sch ii, No 120.

————————. *See* Acts—1877—XV sch ii, No 127.

LIS PENDENS. *See* Acts—1882—IV, ss 52, 53.

LIMITATION. *See* Civil Procedure Code, s. 559.

MAINTENANCE OF WIFE, *what court has jurisdiction to make an order for maintenance. See* Criminal Procedure Code, s 488.

MANDATORY INJUNCTION. *See* Right of suit.

MESNE PROFITS *Ascertainment of a defendant's liability by an operative decree after the declaration of his general liability in a prior decree—His death in the interval between such decrees and effect, in execution, of his representatives not being parties to the operative one*] The question of the amount of mesne profits due, they having been decreed together with the possession of land in 1856, against a body of village proprietors, was not decided till 1877. In that year an operative decree was made against the village proprietors whose names appeared as defendants in the suit of 1856, and in 1881 execution proceedings were taken against the present plaintiffs, attributing to them the character of heirs of the original judgment-debtors:

Held, that the right to execute for mesne profits was not wholly dependent upon whether or not the ancestor of the present plaintiffs had been a party to the decree of 1856, which did not ascertain the amount of the profits, or determine whether the then defendants were liable jointly or severally, in respect of the wrongful possession.

Radha Prasad Singh *v.* Lal Sahab Rai 53

MINOR. *See* Acts—1858—XL, s 7.

MORTGAGE. *Decree against the persons and other property of the judgment-debtors as well as against the property mortgaged. See* Acts—1882—IV, s 90.

————————. *Payment of Government revenue by mortgagees in possession to save the property—Payment of mortgage-money into Court by mortgagors and relinquishment of possession by mortgagees—Subsequent suit by mortgagees to recover the Government revenue paid by them by sale of the mortgaged property—Act IV of* 1882 (*Transfer of Property Act*) *s* 83] The plaintiffs were mortgagees in possession of certain shares in a village under a mortgage which, as to the principal amount advanced, was a simple mortgage, as to the interest, a usufructuary mortgage The mortgagees, to save the property from sale, paid up certain arrears of Government revenue. Subsequently the defendant, who was the representative of the mortgagors, under s 83 of the Transfer of Property Act (XIV of 1882), paid the original sum due under the mortgage into Court. The mortgagees withdrew the money so paid in and deposited the mortgage-deed in Court The mortgagees then, after relinquishing possession of the mortgaged property, sued

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to recover the money which they had paid as Government revenue by sale of the mortgaged property.

Held that though the mortgagees might originally have treated the amount paid by them as Government revenue as part of the mortgage-money, they did not by such payment obtain a lien independently of their position as mortgagees, and when once they had abandoned their lien on the mortgaged property by accepting the money paid into Court by the mortgagors and by relinquishing possession of the mortgaged property, they could not afterwards revive it; and their suit, which was for realization of the Government revenue paid by them by sale of the mortgaged property, must fail.

Semble, a mortgagee, who had given up his lien under circumstances similar to those above described, might bring a simple money suit to recover money paid by him to save the property from sale in execution for arrears of Government revenue.

Kinu Ram Das v. *Mozaffer Husain Shaha*, *Lachman Singh* v. *Salig Ram*, *Achut Ramchandra Pai* v. *Hari Kamti*, *Girdhar Lal* v. *Bhola Nath*, *Parsotam Das* v *Jaijit Singh*, *Nikka Mal* v *Sulaiman Shaikh Gardner*, *Kristo Mohinee Dossee* v *Kaliprosono Ghose*, and *Nugenderchunder Ghose* v. *Sreemutty Kaminee Dossee*, referred to.

Anandi Ram v Dur Najaf Ali Begam 195

MORTGAGE *Prior and puisne incumbrancers—Puisne incumbrancer not made a party to suit upon prior incumbrance—His right to redeem not thereby affected*] If a prior incumbrancer, having notice of a puisne incumbrance, does not, when he puts his mortgage into suit, join the puisne incumbrancer as a party, that puisne incumbrancer's right to redeem will not thereby be be affected.

Mohan Manor v. *Togu Uka*; *Muhammad Sami-ud-din* v. *Man Singh*; and *Gajadhar* v. *Mul Chand* referred to.

Namdar Chaudhri v. Karam Raji 315

———. *Prior and subsequent mortgages—Rights of persons advancing money to pay off a prior mortgage—Suit to sell mortgaged property under mortgage—Form of decree to be given*] Where, in a suit to bring certain immovable property to sale under a mortgage, it was found that the predecessor in interest of one of the defendants had advanced money upon a mortgage of the same immovable property in order to save a portion thereof from sale under two prior mortgages: *held* that such defendant was entitled to the benefit of the payment so made, and that the proper decree in the suit should be that the plaintiff could only bring that portion of the property in suit to sale on payment to the said defendant of the money advanced as aforesaid, with interest from the date of payment to the date of the receipt of the final decree by the Court of first instance together with proportionate costs; such payment to be made within 90 days from the ascertainment of such amount and the receipt of the final decree by the Court of first instance; otherwise the plaintiff to be absolutely debarred from all right to redeem that particular portion of the property mortgaged.

Tulsa v Khub Chand 581

———. *Redemption—Appeal.* *See* Court-fee.

——— *Rights of prior and subsequent incumbrancers* inter se—*Rights of mortgagee purchasing equity of redemption—Right of sale of mortgaged property—Suit to bring mortgaged property to sale, who neces-*

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sary parties to—'Property,' meaning of the term in Act IV of 1882 *—Act IV of* 1882 *(Transfer of Property Act), ss.* 3 *and* 6; *Chap. IV passim—Act I of* 1868 *(General Clauses Act), s.* 2, *cls.* (5) *and* (6)] A and B jointly mortgaged certain immovable property to X by a simple mortgage-deed on the 10th September 1882. They again mortgaged the same property to X on the 23rd February 1884. On the 6th August 1885, A mortgaged a portion of the said property to Y. On the 12th August 1885, B mortgaged a portion of the same property to X. On the 21st August 1885, A mortgaged a portion of the same property to Z. On the 20th September 1886, A and B sold to X the property mortgaged to him and with the proceeds of that sale X's three mortgages were paid off. On the 8th January 1887, Y sued A, B and X for cancelment of the deed of sale of the 20th September 1886, and for sale of the property mortgaged to him under his deed of the 6th August 1885. Y did not make Z a party to this suit. He did not ask for redemption of X's mortgages nor for foreclosure of Z's mortgage.

Upon these facts it was held by EDGE, C. J., STRAIGHT, TYRRELL and KNOX, J. J:—MAHMOOD, J. *dissentiente.*

(1) That X not having exhibited any intention of foregoing altogether his rights in respect of the mortgages of the 10th September 1882 and the 23rd February 1884, was entitled to keep those securities alive and to use them as a shield against the claim of Y, the subsequent mortgagee, to the extent of the amount which was due under them on the 20th September 1886. *Gokuldoss Gopaldoss* v. *Rambux Seochand; Gaya Prasad* v. *Salik Prasad; Mul Chand Kuber* v. *Lallu Trikam; Shantapa* v. *Balapa; Ramu Naikan* v. *Subbaraya Mudali; Sirbadh Rai* v. *Raghunath Prasad; Janki Prasad* v. *Sri Matra Mautangui Debia*, and *Gangadhara* v. *Sivarama* referred to.

(2) That Y as subsequent mortgagee could not bring to sale under his mortgage-deed the property mortgaged to him without first redeeming X's two prior mortgages. *Syud Wajed Hossein* v. *Hafez Ahmed Rezah; Khub Chand* v. *Kalian Das; Kurum-un nisa Bibi* v. *Nilratna Bose; Har Prasad* v. *Bhagwan Das; Muhammad Ibrahim* v. *Tek Chand; Ali Hasan* v. *Dhirja* and *Zalim Gir* v. *Ram Charan Singh* referred to, in addition to the cases cited above. *Raghunath Prasad* v. *Juravan Rai*, distinguished. *Vencata Chella Kandian* v. *Panjanadien; Gangadhara* v. *Sivarama* and the judgments of Mahmood, J., in *Sirbadh Rai* v. *Ragunath Prasad* and in *Janki Prasad* v. *Sri Matra Mautangui Debia* dissented from.

(3) That Z's mortgage of the 21st August 1885 having been registered, Y must be taken to have had notice of it, and, having had notice thereof, was bound to make Z a party to the suit for sale under his (Y's) mortgage.

Damodar Dev Chand v. *Naro Mahadev Kelkar* and *Dullabhdas Dev Chand* v. *Lakshmandas Sarup Chand* referred to.

(4) That the term "property" as used in Chapter IV of Act IV of 1882, means an actual physical object and does not include mere rights relating to physical objects.

Held by the FULL BENCH.

That the Transfer of Property Act (Act IV of 1882), so far as the question of reliefs and procedure is concerned, applies to mortgages executed before the coming into force of the Act. *Ganga Sahai* v. *Kishen Sahai;* and *Bhobo Sundari Debi* v. *Rakhal Chunder Bose* referred to.

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MAHMOOD, J., *contra* —

Inasmuch as a mortgagee cannot bring the mortgaged property to sale without the intervention of a court, a private purchase by the mortgagee of the rights remaining to the mortgagor in such property though it may be valid as against the mortgagor, can have no effect in defeating the rights of puisne and mesne incumbrancers. Moreover, where a second mortgage to a third party intervenes between the mortgage to and the purchase by the prior mortgagee of the rights of the mortgagor, such intermediate mortgage prevents the merger of the rights of the prior mortgagee in such with those which he might acquire by his purchase

The right of sale is an essential incident of a simple mortgage and inheres as well in puisne and mesne as in prior mortgagees, subject to the rights of the prior mortgagees The puisne or mesne mortgagee is not bound by the terms of the prior mortgage, or mortgages, but is entitled to bring the property mortgaged to sale, subject to such prior mortgage or mortgages

The provisions of s 85 of Act IV of 1882 are not absolutely imperative, and though thereunder a subsequent incumbrancer ought to be made a party to a suit by a prior mortgagee on his mortgage, the non-joinder of such subsequent incumbrancer is not a fatal defect in the suit Registration of a subsequent mortgage is not necessarily any notice to a prior mortgagee of the existence of such subsequent mortgage, it being no part of a mortgagee's duty to be on the watch for incumbrances subsequent to his own

The term "property" throughout Act IV of 1882 is used in its most generic sense and will include the right known as an "equity of redemption"

Mata Din Kasodhan *v.* Kazim Husain 432

MORTGAGE *See* Acts 1882—IV, ss 40, 58*(b)*, 69, 100.

———————. *See* Acts—1882—IV, ss 88 and 89

MORTGAGEBOND *See* Acts—1882—IV, ss 67, 88.

MOSQUE *See* Muhammadan Law

MUHAMMADAN LAW—*Public mosque— Right of all Muhammadans without distinction of sect to use such mosque for the purposes of worship— Right to say "amin" loudly during worship.*] Where a mosque is a public mosque open to the use of all Muhammadans without distinction of sect, a Muhammadan who, in the *bonâ fide* exercise of his religious duties in such mosque, pronounces the word '*amin*" in a loud tone of voice, according to the tenets of his sect, does nothing which is contrary to the Muhammadan ecclesiastical law or which is either an offence or civil wrong, though he may by such conduct cause annoyance to his fellow worshippers in the mosque But any person, Muhammadan or otherwise, who goes into a mosque not *bonâ fide* for religious purposes, but *malâ fide* to create a disturbance there and interferes with the devotion of the ordinary frequenters of the mosque, will render himself criminally liable

Jangu *v* Ahmad ullah 419

———————*Wakf—Construction of document.*] Where a Muhammadan of the Shia sect executed a document purporting to come into operation after his death, which document provided in a most complete manner for the devolution of his property, with the intention apparently

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of preserving the estate in perpetuity intact under the headship of some male member of the family, with provision by way of allowances for the other members, and of maintaining the dignity of the *riasat*, and in which no express mention of any sort of dedication of the property to charitable purposes was made, though there was some incidental reference to certain religious duties.

Held that such a document could not be construed as creating a *wakf*. Though it was not impossible that a document creating a *wakf* might contain provision also for the family of the settlor, the dedication to charitable uses being postponed, yet here there was not even an ultimate dedication of the property to charitable uses, but the object of the executant was evidently merely the maintenance of the family estates and of the dignity of the *riasat*.

Sheik Mahomed Ahsanulla Chowdhry v. *Amarchand Kundu* followed. *Ranee Khujooroonissa* v. *Mussamut Roushun Jehan and Nizamuddin Gulam* v. *Abdul Gafur* referred to.

Murtazai Bibi *v.* Jumna Bibi 261

NON-JOINDER. *See* Parties.

OCCUPANCY HOLDING, TRANSFER OF. *First and second mortgages of occupancy holding—Suit by second mortgagee to eject first mortgagee in possession.*] Where an occupancy holding was mortgaged under two successive mortgage deeds to different parties, and the mortgagees under the first mortgage having been put in possession, the mortgagees, under the second mortgage sued to eject them.

Held that, both parties being wrong-doers, inasmuch as both mortgages were illegal, the defendants, who were in possession, had a right, as against the plaintiffs, to retain possession.

Usuf Khan *v.* Sarvan 403

PARTIES. *Mesne profits—Non-joinder.*] The question of the amount of mesne profits due, they having been decreed together with the possession of land in 1856, against a body of village proprietors, was not decided till 1877. In that year an operative decree was made against the village proprietors whose names appeared as defendants in the suit of 1856, and in 1881 execution proceedings were taken against the present plaintiffs, attributing to them the character of heirs of the original judgment-debtors:

Held, that the right to execute for mesne profits was not wholly dependent upon whether or not the ancestor of the present plaintiffs had been a party to the decree of 1856, which did not ascertain the amount of the profits, or determine whether the then defendants were liable jointly or severally, in respect of the wrongful possession.

Before the issue of a money decree which was capable of being put into execution, the alleged ancestor of the present plaintiffs was dead, and the latter, not having been parties to that decree, were not liable under it.

Radha Prasad Singh *v.* Lal Sahab Rai 53

PLEADER. *See* Acts—1879—XVIII, s. 13.

POSSESSION. *See* Acts—1877—I, s. 9.

PRACTICE. *See* Acts—1873—X, ss. 10 and 11.

———. *See* Second Appeal.

———. *See* Suit for balance of account.

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PRE-EMPTION. *Decree conditional on payment of price stated within a fixed period, otherwise suit to stand dismissed - Non payment of pre-emptive price—Appeal after expiration of period fixed by decree*] The plaintiff in a pre-emption suit obtained a decree in his favor for pre-emption of the share in suit on payment of a fixed sum within a period specified in the decree, otherwise his suit was to stand dismissed

Held that such plaintiff could appeal from such decree after the period prescribed therein had elapsed without his paying in the pre emptive price fixed thereby, both as to the correctness of the pre-emptive price and as to the reasonableness of the time allowed for payment.

Kodai Singh *v.* Jaisri Singh 376

———————. *See* Acts—1873—XIX, ss 166, 168 and 188.

———————. *Wajib ul-arz, construction of—Muhammadan Law*] In a suit for pre-emption based on a *wajib-ul-arz* the material words of the *wajib ul-arz* under the heading of "Custom for pre emption" were as follows:—"At the time a proprietary share is transferred a right of purchase will vest, first, in a co sharer of the same family, and then in the other co sharers of the village in preference to a stranger, provided that the same price is paid by the co-sharer as is offered by the stranger"

Held that these words were intended to define a special custom of of pre emption, and did not merely mean that the custom of pre-emption according to the Muhammadan law was to be followed.

Ram Prasad v. *Abdul Karim*, distinguished.

Jasoda Nand *v* Kandhaiya Lal 373

———————. *See* Wajib-ul arz, effect of as evidence of village custom.

PRESUMPTION. *See* Hindu Law

PRIOR AND PUISNE INCUMBRANCERS, RIGHTS OF. *See* Mortgage.

PRIOR AND PUISNE INCUMBRANCERS. *See* Mortgage.

PRIORITY. *See* Acts—1877—III, s. 50.

PROMISSORY NOTE *See* Stamp.

"PROPERTY," MEANING OF IN ACT IV OF 1882. *See* Mortgage.

REGISTERED AND UNREGISTERED DOCUMENTS. *See* Acts—1877—III, s. 50.

REGISTRATION. *See* Execution of decree *and* Acts—1877—III, ss 3, 17, 47, 49.

RES JUDICATA. *Execution of decree—Principle of* res judicata *as applied to execution proceedings—Rule in Surju Prasád* v *Sita Rám—Civil Procedure Code, s* 373] Where a judgment-debtor, being entitled and having an opportunity to plead s 373 of the Code of Civil Procedure as a bar to execution of the decree against him neglects to do so, and the application in respect of which such objection might have been taken is entertained by the Court and orders passed thereon, the principle of *res judicata* will apply to such proceedings, and the judgment-debtor cannot at a subsequent stage of the same execution proceedings object that such previous application for execution ought, in fact, to have been held to be barred by the operation of s. 373 abovementioned.

Sher Singh *v.* Daya Rám 564

———————. *See* Acts—1873—XIX, s. 113.

———————. *See* Civil Procedure Code, ss. 13, 43.

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REVISION. *See* Acts—1887—IX s. 25.

————. *See* Acts—1887—IX, s. 25.

RIGHT OF SUIT. *Trespass—Building on plaintiff's land—Damages—Mandatory injunction—Suit for further damages—Alleged disobedience of mandatory injunction—Cause of action Suit not maintainable.*] The defendant having built a wall on the plaintiff's land, the plaintiff brought a suit in which he asked for damages for the trespass and an injunction, and a decree was passed for damages and for a mandatory injunction directing the defendant within two months to remove the wall, and to restore the plaintiff's premises to their former condition. Two years subsequently the plaintiff brought another suit for damages, alleging his cause of action to be the defendant's disobedience of the mandatory injunction, and proving as damages that people were deterred from becoming his tenants by fearing that, owing to the defendant's previous action, the hillside on which the plaintiff's premises were situate, was likely to fall. There was no structural or other damage done to the plaintiff's property other than that which was done prior to the commencement of the previous suit.

Held that the suit would not lie for damages for non-compliance with the mandatory injunction, to compel the performance of which the plaintiff had his remedy in execution. *Mitchell* v. *Darley Main Colliery Company* distinguished.

Jawitri v. H. A. Emile 98

RULES BY GOVERNOR-GENERAL IN COUNCIL. *See* Stamp.

SALE-DEED. *See* Construction of documents.

SALE OF MORTGAGED PROPERTY. *See* Mortgage.

SECOND APPEAL. *Plea raised at the hearing which was not taken in the morandum of appeal—Practice.*] A plea that the memorandum of appeal in the lower appellate Court was insufficiently stamped, and that such deficiency was not made good within the period of limitation, is not plea which can be raised at the hearing of a second appeal, when it has not been taken in the memorandum of appeal.

Rám Kishen Upadhia v. Dipa Upadhia 580

————————. *See* Civil Procedure Code, s 542.

SESSIONS COURT. *See* Criminal Procedure Code, ss. 268, 285.

SET-OFF. *See* Suit for balance of account.

SMALL CAUSE COURT. *See* Acts—1887—IX, s. 25.

————————. *See* Acts—1887—IX s. 25.

STAMP. *Promissory note not chargeable with duty of* 6, 10 *or* 12 *annas—Such promissory note written on impressed sheet of proper value bearing the word "hundi"—Note duly stamped—Act I of* 1879 *(Stamp Act), ss* 3(10), 9, 33, 34, 57—*Rules by Governor-General in Council—Notification No.* 1288 *of* 3*rd March* 1882, *Rules* 3, 4, 6—*Notification No.* 2955 *of* 1*st December* 1882, *Rule* 6*A*] The effect of Notification No. 2955 of the 1st December 1882, amending the Rules made by the Governor-General in Council under s. 9 of the Stamp Act (I of 1879) and published in Notification No 1288 of the 3rd March 1882, is not to prohibit all promissory notes except those chargeable with a duty of 6, 10 or 12 annas being written on impressed sheets bearing the word "*hundi.*" A rule which says that certain promissory notes shall be written on impressed sheets bearing the word "*hundi,*" cannot be

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interpreted as enacting that other promissory notes shall not be written on impressed paper of the proper value if it happens to bear the word "*hundi*"

A promissory note for an amount not exceeding Rs. 200, payable otherwise than on demand, but not more than one year after date, and requiring a stamp of two annas, is duly stamped if written on an impressed sheet of the value of two annas, though that impressed sheet bears the word "*hundi*."

Radha Bai *v.* Nathu Ram 66

SUIT, BY ASSIGNEE TO ESTABLISH RIGHT TO ATTACHED PROPERTY. *See* Civil Procedure Code, ss. 258 and 283.

——, BY PURCHASER AT SALE IN EXECUTION OF DECREE FOR RETURN OF PURCHASE MONEY. *See* Civil Procedure Code, ss. 295, 315.

——, BY PURCHASER OF DECREE TO RECOVER MONEY OF DECEASED JUDGMENT-DEBTOR IN THE HANDS OF HIS AGENT. *See* Acts—1877—XV, sch. ii, No. 120.

——, FOR BALANCE OF ACCOUNT. *Practice—Set-off—Civil Procedure Code, s.* 111.] The defendant was lessee from Government of a bridge of boats over the Ganges under a lease for five years, the consideration for which was payable by instalments extending over the term of the lease. The lease contained, amongst other provisions one to the effect that the Government, if it saw fit at the expiration of the lease to farm the bridge to any other contractor, should be bound to take over the lessee's plant at a fair valuation to be determined by arbitration; and another clause provided that "should the Government, however, see fit to cancel the lease during its currency with a view to substitute a pontoon bridge, or for any other cause for which the lessee is not responsible he will be entitled to compensation from Government for all losses." The lessee died before the expiration of the lease, and the Magistrate of the District, acting on behalf of the Government, proceeded to deprive his representatives of the use of the bridge and to seize the stock and materials. The Magistrate then directed two persons to assess the value of the stock, which was ultimately fixed at Rs 10,900. The Magistrate added a percentage, bringing the total amount up to Rs. 12,100; and a suit was filed on behalf of Government against the representatives of the deceased lessee giving credit to the defendants for such amount, and claiming the balance due in respect of the last two instalments under the contract.

Held that the sum of Rs. 12,100 assessed in the manner above described could not strictly be regarded as a set-off. The suit was one for balance of account and the defendants were entitled to dispute the correctness of the plaintiff's estimate of the item allowed in their favor.

The Secretary of State for India in Council *v.* Madari Lal ... 296

——, FOR DECLARATORY DECREE. *Declaration sought that certain property was joint ancestral property and not liable to attachment in execution of a certain decree—Court-fee payable on such suit.*] The plaintiffs specified in their plaint as the reliefs sought by them,—(1) That it be declared by the Court that the property mentioned at foot is the joint ancestral property of the plaintiffs and not liable to attachment and sale in execution of the decree of the defendant No. 4, dated 4th December 1883, against the defendant No. 1. (2) That the costs of the suit be also awarded by the decree. The suit is valued with reference to the

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amount of the decree and the value of the property at Rs. 6,000. (3) That any other relief which the Court may think the plaintiffs entitled to may also be granted.

Held, that the suit should be deemed a suit for one declaratory decree only, without consequential relief, and that consequently a court-fee of Rs. 10 was sufficient.

Gobind Nath Tiwari *v.* Gajraj Mati Taurayan 389

SUIT, FOR DECLARATION OF RIGHT TO PARTITION. *See* Acts—1873—XIX, s. 113.

——, FOR RESTITUTION OF CONJUGAL RIGHTS. *See* Hindu Law.

——, IN FORMÂ PAUPERIS.—Appeal, *See* Civil Procedure Code, ss. 411, 412.

——, ON MORTGAGE, WHO NECESSARY PARTIES TO. *See* Mortgage.

SURETY, LIABILITY OF. *See* Civil Procedure Code, ss. 336, 344.

TRESPASS. *See* Rights of suit.

WAKF. *See* Muhammadan Law.

WAJIB-UL-ARZ, CONSTRUCTION OF. *See* Pre-emption.

——————, EFFECT OF AS EVIDENCE OF VILLAGE CUSTOM. *Wajib ul-arz not signed by lambardár or co-sharers—Construction of wajib-ul-arz—Pre-emption.*] Where a *wajib-ul-arz* was not signed by the lambardár or by any of the co-sharers of the village for which it was framed, but was found to have been in existence without having been questioned by any of the parties who might have been affected thereby for a period of some thirteen years: *Held* that the *wajib-ul-arz* might be taken as *primâ facie* evidence of the custom of the village for which it was framed.

The said *wajib-ul-arz* contained a clause relative to pre-emptive rights to the following effect:—"When any *muafidár* in the *patti* desires to transfer his share, then first a shareholder in the *patti* takes it, and if he does not take it, then another man who desires to take it takes it." *Held* that this clause was declaratory of the village custom and that it was not intended thereby to adopt the Muhammadan law of pre emption

Rustam Ali Khan *v.* Abbasi Begam 408

WORDS "*Ark*," "*Mustaghraq*." *See* Acts—1882—IV, ss. 40, 58(*b*), 69, 100.